

RECEIVED

JUL 29 1970

CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 23,772

No. 23,853

523

United States Court of Appeals
for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS **FILED** JUL 29 1970
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

No. 23,772

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 23,853

FIBREBOARD CORPORATION,
Petitioner.

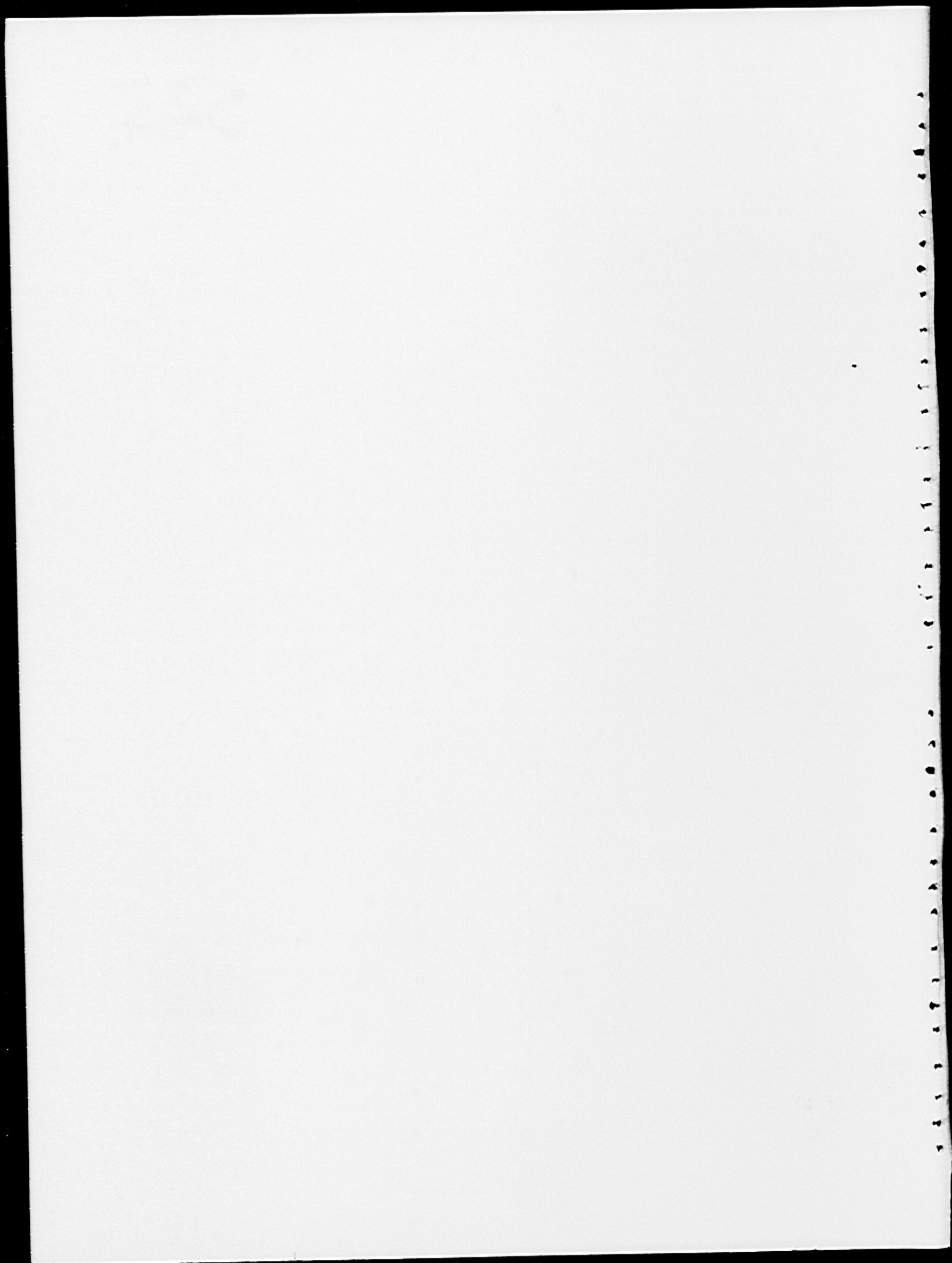
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON CONSOLIDATED PETITIONS FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF A SUPPLEMENTAL
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL APPENDIX

William R. Irwin
BROBECK, PHLEGER & HARRISON
One Eleven Sutter Street
San Francisco, California 94104
*Attorneys for Petitioner
Fibreboard Corporation*



(i)

TABLE OF CONTENTS

General Counsel's Exceptions to the Trial Examiner's Backpay Decision	1
Respondent's Exceptions to the Trial Examiner's Decision, Recommendations and Recommended Order	15
Exceptions of East Bay Union of Machinists, Local 1304, United Steelwork- ers of America AFL-CIO To Trial Examiner's Intermediate Report	18
General Counsel's Corrections to Exceptions to Trial Examiner's Backpay Decision	37



SA 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIBREBOARD PAPER PRODUCTS CORPORATION

and

Case No. 20-CA-1682

EAST BAY UNION OF MACHINISTS, LOCAL 1304,
UNITED STEELWORKERS OF AMERICA, AFL-CIO; and
UNITED STEELWORKERS OF AMERICA, AFL-CIO

GENERAL COUNSEL'S EXCEPTIONS
TO THE TRIAL EXAMINER'S BACKPAY DECISION

Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46 (a), Counsel for the General Counsel of the National Labor Relations Board hereby files exceptions to certain portions of the Trial Examiner's Backpay Decision in the above case, which decision was issued on May 23, 1968, by Trial Examiner Henry S. Sahm.

<u>Page</u>	<u>Line</u>	<u>Exceptions</u>
3	7 - 8	1. To the statement that the Board's Supplemental Decision issued on September 14, 1962. <u>The</u> said decision issued on September 13, 1962. See 138 NLRB 550. <u>7</u>
3	23	2. To the failure to include the matter of F. C. Johnson's eligibility for backpay among the issues in dispute.
6	53-55	3. To the conclusion that there is agreement among the parties with respect to the average quarterly earnings of <u>each</u> terminated employee during the base period, August 4, 1958 through July 31, 1959. <u>The</u> parties are in dispute as to the average quarterly earnings of David Arca during the base period. (Tr. 7, 406-408). <u>7</u>

- 8 24-25 4. To the finding that in January, 1965, the independent contractor's employees received a wage of \$4.00 per hour. [The independent contractors' employees were paid \$4.63 per hour from June 16, 1963 through June 15, 1965 (Tr. 124,875,876,935,936).]
- 8 43-46 5. To the finding that the record is not entirely clear as to the exact wage rate paid to the independent contractor by Respondent and to the conclusion that it appears to have been approximately \$4.00 per hour. [The wage rates paid to the independent contractors' employees from June 16, 1959 to June 16, 1967 were stipulated by the parties (Tr. 935,936) and the amount in excess thereof--i.e., the contractors' profit--has no materiality herein.]
- 8 51-54 6. To the finding that \$4.00 was the rate paid to the independent contractor. [See parenthetical comment following Exception No. 5, above.]
- 10 2 - 5 7. To the finding that Respondent subcontracted the maintenance work to an independent contractor at a wage rate less than the machinists had been receiving. [The independent contractor paid a wage rate in excess of that received by the machinists herein (Tr. 124,875,876,935,936).]
- 10 42-46 8. To the conclusion that Burke testified the ILWU millwrights received no wage increase in 1959 or 1960 because he forgot all about them.
- 11 19-21 9. To the finding that on February 1, 1964 automatic controls were installed in the powerhouse. [The

correct date is January 15, 1964 (Tr. 122).7

11

25-26

10. To the statement that the Union claims the normal complement as of July 31, 1959 was 37 machinists and four helpers. The Union stated that, as of July 31, 1959, there were 39 machinists and 14 employees on which there is no issue: 10 powerhouse employees and 4 helpers (Tr. 458).7

12

38-40

11. To the statement that the Union acknowledges that there was some elimination of work in the main machine shop as a result of changes in the floor covering, linoleum and roofing departments. The Union acknowledged only that the closing of the floor covering plant on October 1, 1960, eliminated two machinists jobs; the closing of the linoleum plant on July 1, 1961, eliminated nine machinists and one helper job; the closing of the central storehouse in December 1961 eliminated one storekeeper's job; and that the moving of the roofing plant on March 1, 1962, added one machinist job (Tr. 11, 32, U. Exh. 26).7

12

50-52

12. To the finding that the Union concedes Swisher and Yoch were replacing Holmes and Jobe who were ill. No such concession appears in the record, nor is there any evidence that the hire of Swisher and Yoch was related to the absence of Holmes and Jobe. In this regard, see stipulation at Tr. 499,500.7

14

20-24

13. To the statement that General Counsel failed to state in his brief to the Trial Examiner a definite

figure representing the number of jobs available during the backpay period. [General Counsel's brief to the Trial Examiner stated in this regard that there were 29 machinists jobs, 2 helper jobs and 10 powerhouse jobs, or ". . . a total of 41 jobs from September 14, 1962 . . . until January 15, 1964 . . . From January 15, 1964 until . . . January 18, 1965, there was a total of 36 jobs: 29 machinists, 2 helpers and 5 engineers" (G.C. Brief, pp. 16,17).]

- | | | |
|----|-------|---|
| 15 | 7 - 9 | 14. To the finding that rigging, pipefitting and welding were not part of Local 1304's work prior to July 31, 1959. <u>[The opposite is shown by the question-and-answer Offer of Proof (Tr. 663-666) rejected by the Trial Examiner.]</u> |
| 15 | 12-15 | 15. To the finding that the number of jobs available during the entire backpay period (a period of 28 months) should be based on hours worked by the independent contractor's millwrights during only a part of the backpay period (a period of 13 months). |
| 15 | 15-17 | 16. To the finding that the number of maintenance men required by the independent contractor to service the Martinez plant was five. |
| 15 | 25-27 | 17. To the finding that 21 maintenance machinists jobs were available during the backpay period, consisting of 14 at Emeryville, 5 at Martinez, and 2 in the paint department and felt mill. |
| 15 | 33-34 | 18. To the finding that the hiatus period was from August 1, 1959 to September 14, 1962. <u>[The hiatus</u> |

period ran from August 1, 1959, the day following the discharges, through September 13, 1962, the date of issue of the Board's supplemental decision,

138 NLRB 550.7

- | | | |
|-----|-------|--|
| 15. | 39-43 | 19. To the statement that General Counsel contends that each of the terminated employees is entitled to retirement benefits for the period from August 1, 1959, to the end of the backpay period and not merely for the backpay period itself. <u>General Counsel's</u> contention is that ". . . each terminated employee is entitled to full participation in Respondent's Retirement Plan from August 1, 1959 to the end of <u>his</u> backpay period." (Emphasis supplied) (G.C. Brief to TX, p. 32). <u>7</u> |
| 15 | 43-45 | 20. To the statement that General Counsel argues that each terminated employee is entitled to full participation in Respondent's Retirement Plan from August 1, 1959 to January 18, 1965. <u>See</u> comment following Exception No. 19, above. <u>7</u> |
| 18 | 15-16 | 21. To the finding that September 14, 1962 was the date of the Board's supplemental decision. <u>The Board's</u> supplemental decision was dated September 13, 1962. See 138 NLRB 550. <u>7</u> |
| 18 | 21-30 | 22. To the finding that the terminated employees are not to be entitled to any retirement benefits for the hiatus period except under Sections 6(b), 13(a), 14 and 15 of the Retirement Plan. |

- | | | |
|-----------------|---------------|--|
| 18 | 32-39 | 23. To the determination that the General Counsel's argument concerning retirement benefits for the hiatus period is without merit or precedent. |
| 18 | 44-49 | 24. To the inherent finding that September 14, 1962, was the end of the hiatus period and to the conclusion that the arguments of General Counsel and the Union with respect to retirement credits are tantamount to a position that the discharges are entitled to backpay for the hiatus period and would violate the Board's order to exclude the backpay period.
<u>[See comment following Exception No. 18, above.]</u> |
| 18 | 53-57 | 25. To the statement that General Counsel and Union's counsel fail to distinguish between pension benefits and backpay for the hiatus period. |
| 18
and
19 | 60
to
3 | 26. To the finding that no retirement credit is granted, insofar as the dollar amount of the pension is concerned, during a break in the employee's service except for vesting early retirement. <u>[The record reflects that employees on military leave were not required to contribute to the fund while on military duty but were nevertheless accorded current service benefits for that period, based on their salary at the time they entered military service, and that such current service benefits were translated into increased pension benefits at the time of retirement (Tr. 477,478). General Counsel contends that a like credit should be accorded for the hiatus period to the terminated employees herein.]</u> |

- | | | |
|-----------------|---------------|---|
| 19 | 3 - 4 | 27. To the conclusion that the contentions of General Counsel and the Union concerning retirement credits for the hiatus period are without merit and must be disallowed. |
| 22 | 20-24 | 28. To the finding that the compulsory retirement dates of seven named employees occurred on dates prior to January 1, 1963. |
| 22 | 24-30 | 29. To the failure to credit Lloyd Ferber's testimony with respect to the oral agreement concerning the retirement dates of certain employees. |
| 22 | 30-51 | 30. To the reliance on the wholly irrelevant letter of June 21, 1957, as a basis for finding that an oral agreement was not made. |
| 22 | 51-53 | 31. To the finding that no such oral agreement as the Union claims ever existed. |
| 22
and
23 | 53
to
3 | 32. To the reliance on a second wholly irrelevant letter as a basis for finding that an oral agreement did not exist and the conclusion that "the proper way to validate a previously agreed upon oral understanding was to put it in writing." |
| 23 | 9 - 11 | 33. To the statement of belief that the Employer's listing of the seven employees' retirement dates (in Union Exhibit 17) as January 1, 1963, was "coincidental error" and not confirmation of the fact, |
| 23 | 22-25 | 34. To the conclusion that General Counsel's contention as to Ferber's testimony is without merit and the rejection of Ferber's testimony as not to be credited and not "substantial evidence." |

- | | | |
|----|-------|---|
| 23 | 27-29 | 35. To the finding that reliance on the oral agreement, if made, would be a violation of the parol evidence rule. <u>The antecedent oral agreement does not alter, modify or contradict the written retirement plan, but merely clarifies its non-specific provisions as to deferred retirements. Therefore, neither the admission of testimony with respect to the oral agreement nor reliance thereon violates the parol evidence rule.</u> |
| 23 | 33-37 | 36. To the reliance on a single subparagraph in the Retirement Plan, ignoring other pertinent provisions, as a basis for rejecting contentions of General Counsel and the Union. |
| 23 | 39-43 | 37. To the finding that deferred-retirement provisions of the Retirement Plan are not applicable. |
| 23 | 44-53 | 38. To the finding that the compulsory retirement dates of seven named individuals occurred on dates prior to January 1, 1963. |
| 24 | 26-27 | 39. To the statement that General Counsel contends that severance pay was paid prior to the date of discharge. |
| 24 | 58-60 | 40. To the conclusion that the deduction of severance pay depending on whether paid during the backpay period is "a distinction without a difference." |
| 25 | 4 - 5 | 41. To the finding that the employment relationship was not severed assertedly based on the Board's reinstatement order. |
| 25 | 5 - 9 | 42. To the finding that not permitting deduction of severance payments paid prior to the backpay period |

would be equivalent to penalizing the Respondent and would have the effect of giving the employees a payment without consideration on their part.

- | | | |
|----|--------|---|
| 25 | 9 - 13 | 43. To the finding that severance payments should be deducted from gross backpay owing. |
| 26 | 9 - 15 | 44. To the reliance on threats allegedly made by individuals other than the three employees accused of misconduct. |
| 26 | 28-29 | 45. To the finding that a car which stopped to avoid Arca's truck was pelted with solid objects. |
| 26 | 41-43 | 46. To the finding that Arca's truck rammed into an auto. |
| 27 | 30-31 | 47. To the finding that Beck "gave a head signal toward the direction of 20 to 30 men congregated a short distance away." |
| 27 | 40-41 | 48. To the finding that Arca struck Hanger twice in the mouth. |
| 27 | 44-47 | 49. To the finding that Hanger corroborated Parker's version of the occurrences of August 19. |
| 27 | 59-61 | 50. To the discrediting of certain testimony of Arca and Beck. |
| 28 | 3 - 5 | 51. To the finding that the Union and its members, Arca, Beck and Olson were cited and found guilty on October 7, 1959, of contempt of court for violating the injunction of the California Superior Court. |
- The said Court issued its findings of fact and conclusions of law on October 7, 1959. The Court's order was entered on December 2, 1959, (Tr. 3).

- | | | |
|----|--------|---|
| 33 | 41-42 | 52. To the finding that the conduct of Area and Beck was violent and unprotected. |
| 33 | 44-48 | 53. To the finding that it would better effectuate the purposes of the Act to "penalize" the employees by not requiring their reinstatement. |
| 34 | 9 - 13 | 54. To the finding that the Employer's summary discharge of 53 employees was "nonprovoking," "unaggravating" and an unfair labor practice of "technical nature." |
| 34 | 10-17 | 55. To the finding that reinstating the three employees would be equivalent to ignoring and condoning their conduct and would subvert principles of law and order. |
| 34 | 18-19 | 56. To the finding that the conduct of Area and Beck was violent, unlawful and one-sided. |
| 34 | 30-31 | 57. To the recommendation that Area and Beck be refused reinstatement and backpay. |
| 38 | 16-21 | 58. To the assertion that "in fashioning any remedy, it is necessary that the nature of the unfair labor practice be looked to and the facts on which it is premised. This is particularly so in this case as the Respondent's conduct was minimal in its execution, devoid of union animus and concededly economic in its motivation." |
| 38 | 26-28 | 59. To the finding that F. C. Johnson did not make diligent and reasonable efforts to secure interim work after his termination. |
| 38 | 33-38 | 60. To the finding that F. C. Johnson's job termination "accelerated the date of his expected retirement, as indicated by the fact that eight months later |

Johnson sold his home in Oakland and moved to Lake Tahoe where he built a home on a lot he had purchased three years earlier admittedly in anticipation of the time when he would retire."

38

40-52

61. To the reliance on F. C. Johnson's investment income and prospective social security benefits as a basis for inferring that he was "not obliged to resort to seeking diligently any other work" and lacked motivation in seeking work.

38

52

and

to

39

1

62. To the finding that F. C. Johnson's efforts to obtain work in the Bay Area were half-hearted and lackadaisical.

39

1 - 7

63. To the reliance on F. C. Johnson's moving to a different locality and "his few jobs and sporadic periods of employment by others (as contrasted with his self-employment) both at Lake Tahoe and the Bay Area from 1959 to 1965" as a basis for finding that Johnson "thereby removed himself from the labor market."

39

8 - 15

64. To the reliance on F. C. Johnson's actions in response to Respondent's reinstatement offer of March 1965, as corroboration for the finding that Johnson had removed himself from the labor market during the backpay period.

30

17-21

65. To the characterization of F. C. Johnson's contacts with the State employment agency and his union as sham and insincere and "an automatic going through

the motions in order to be eligible for unemployment compensation."

- | | | |
|-----------------|-----------------------|--|
| 39 | 28-38 | 66. To the finding that F. C. Johnson's testimony was inconsistent, self-contradictory, unspecific, vague, incoherent, unimpressive, purposefully vague and obscure, self-serving, unimpressive, incredible, and a maze of confusion, equivocations, improbabilities, and inability to recall details. |
| 39 | 38-41 | 67. To the assertion that General Counsel examined F. C. Johnson through leading and suggestive questions. |
| 39 | 38-39
and
58-63 | 68. To the implication that General Counsel was not entitled to ask leading questions of a witness called by Respondent. |
| 39
and
40 | 41
to
3 | 69. To the refusal to grant probative value to testimony elicited in a completely proper cross-examination. |
| 40 | 23-29 | 70. To the finding that F. C. Johnson "did not engage in a diligent and continuous effort to find gainful employment during the backpay period, but, on the contrary, failed to make a reasonable search to find other work and thereby incurred a willful loss of earnings." |
| 40 | 30 | 71. To the finding that F. C. Johnson is not entitled to backpay. |
| 40 | 34-43 | 72. To the finding that early retirement benefits received by certain employees during the hiatus period (i.e., before the backpay period began) should be deducted from backpay owing to them. |

- | | | |
|-----------------|----------------|--|
| 41 | 17-18 | 73. To the finding that there are 21 bargaining unit jobs available. |
| 41 | 20-21 | 74. To the finding that Respondent is to be credited with severance allowances as a deduction against backpay. |
| 41 | 23-25 | 75. To the finding that Respondent is entitled to be credited with amounts paid as early retirement benefits and for retirement plan deposits owing for the backpay period, for those electing reinstatement. |
| 41 | 27-29 | 76. To the finding that the retirement dates of seven named employees occurred prior to January 1, 1963. |
| 41 | 31-33 | 77. To the finding that F. C. Johnson is not entitled to backpay based on the asserted ground that he failed to make diligent efforts to obtain equivalent employment during the backpay period. |
| 41 | 35-38 | 78. To the finding that the terminated employees are not entitled to any benefits during the hiatus period (August 1, 1959 - September 14, 1962) except for computing the date on which they will be eligible to retire. |
| 41 | 40-41 | 79. To the finding that asserted misconduct of Arca and Beck bars them from reinstatement and backpay. |
| 41
and
42 | 43
to
35 | 80. To the amounts set forth opposite the listed names of employees and to the failure to include as eligible for backpay or other benefits, employees Aiello, Arca, Beck, Bennett, Bergstrom, Capps, Fuller, Gronberg, Hall, Hickethier, Hicks, Holmes, |

Homan, F. C. Johnson, J. P. Johnson, Lowell, Nash, Oswill, Smith, Seisher, Vanderbeck and Weismiller.

42

39-41

81. To the implication that retirement benefits paid during the hiatus period should be deducted from backpay due.

Appendix A,
pp. i-vi

82. To the deduction of severance allowance and/or early retirement benefits from backpay due to the employees listed in Appendix A, pp. i-vi, and the failure to include as eligible for backpay other employees as listed in Exception No. 82 above.

Appendix A,
P. v

83. To the failure to compute and report C. W. Olson's gross backpay through October 21, 1967, the date on which his job was eliminated; to the computation of net interim earnings for Olson to June 30, 1967 rather than October 21, 1967; and therefore, to the amounts set forth as net interim earnings, net quarterly backpay, and net backpay for C. W. Olson.

DATED AT San Francisco, California this 16th day of August, 1968.

Respectfully submitted,

/s/ William F. Roche

William F. Roche,
Counsel for the General Counsel
National Labor Relations Board, Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

[Caption Omitted in Printing]

Respondent's Exceptions to the Trial Examiner's Decision, Recommendations and Recommended Order

Respondent Fibreboard Corporation excepts to the Decision, Recommendations and Recommended Order of Trial Examiner Henry S. Sahm in the following particulars:

1. The finding that the number of maintenance machinists' jobs available at the Respondent's plants in Emeryville and Martinez, California, during the backpay period was 21 (TRX p. 15, lines 25-28) and the failure to find that this number was 16. The portions of the record relied upon for this exception, as well as the grounds therefor, are set forth in Section II., pages 8-20, of the supporting Brief filed herewith.*
2. The finding that the number of machinists jobs available at the Emeryville plant during the backpay period was 16 (TRX p. 15, lines 12-28) and the failure to find that the number was 11. Resp. Br., Section II., pages 8-20.
3. The finding that the members of Local 1304 were entitled to the rigging, welding and pipefitting work during the backpay period because they performed this work after their reinstatement (TRX p. 14, line 58 to p. 15, line 2; p. 15, lines 7-10, 12-15, 23-28) and the failure to find that this work should have been excluded in determining the number of jobs available. Resp. Br., Section II., pages 8-9, Section II.B., pages 13-16.
4. The finding that work in the paint shop which had been performed prior to July 31, 1959, by Local 1304 maintenance employees, was performed after that date by ILWU production employees (TRX p. 15, lines 3-6, 17-19) and the failure to find that all the work previously performed by Local 1304 personnel in the paint shop was performed during the backpay period by millwrights employed by the independent contractor working out of the main and truck shops. Resp. Br. Sections II.A., II.B., II.C., pages 10-18.
5. The finding that a job should be assigned to the paint plant for the backpay period (TRX p. 15, lines 17-28) and the failure to find that no job was available in the paint plant during the backpay period and that any maintenance work in the location is accounted for by the jobs available in the main and truck shops. Resp. Br., Sections II.A., II.B., II.C., pages 10-18.

*All subsequent references herein made to the supporting brief (Resp. Br.) are, in the case of each exception listed, to the portions of the brief which cite the parts of the record and discuss the grounds pertinent to that exception.

6. The finding that work in the felt mill which had been performed prior to July 31, 1959, by Local 1304 maintenance employees, was performed after that date by millwrights represented by the ILWU (TRX p. 15, lines 3-6, 17-19) and the failure to find that all the work previously performed by Local 1304 personnel in the felt mill was performed during the backpay period by millwrights employed by the independent contractor working out of the main and truck shops. Resp. Br., Sections II.A., II.B., pages 10-16, Section II.C., pages 18-19.

3 7. The finding that a job should be assigned to the felt mill for the backpay period (TRX p. 15, lines 17-27) and the failure to find that no job was available in the felt mill during the backpay period and that any maintenance work in that location is accounted for by the jobs available in the main and truck shops. Resp. Br., Sections II.A., II.B., pages 10-16, Section II.C., pages 18-19.

8. The finding that automatic controls were installed in the power house on February 1, 1964, thereby eliminating the jobs of 5 firemen (TRX p. 14, lines 43-45) and the failure to find that these controls were installed on January 15, 1964, at which time the jobs of the working foreman and 4 firemen were eliminated. Resp. Br., Section II.A., page 11.

9. The finding (if it is a finding, it is excepted to as both wrong and unnecessary) that the number of jobs remaining at the beginning of the backpay period, exclusive of the power house, was 31 (TRX p. 14, lines 50-53) and the failure to find that this number was 16. Resp. Br., Section II.A., pages 10-12.

10. The recommendation that interest be paid on the net backpay due from the end of each calendar quarter during the backpay period (TRX p. 25, lines 22-31) and to the failure to find that such interest is not proper and cannot be assessed when not called for by the Board's original backpay order. Resp. Br., Section III., pages 20-23.

11. The finding that the only misconduct engaged in by Carl Olson was the throwing of a "small, harmless plastic vial of paint" (TRX p. 27, lines 3-7; p. 33, line 48 to p. 34, line 1) and the failure to find that Olson came to the picket line armed to do violence and, in an attempt to disrupt the entry of vehicles into the plant, threw rocks and other objects in addition to the bottle of paint. Resp. Br., Section IV., page 24.

12. The finding that the Respondent's unfair labor practice should be weighed against the misconduct of Olson (implied from TRX p. 29, line 1 to p. 34, line 5) and the failure to find that the picketing and accompanying misconduct was in no way related to that unfair labor practice. Resp. Br., Section IV., page 25.

4 13. The finding that Carl Olson is entitled to reinstatement and backpay (TRX p. 33, line 48 to p. 34, line 5) and the failure to find that Olson had forfeited his right to reinstatement and back-

pay by picket line misconduct. Resp. Br., Section IV., pages 23-26.

14. The recommended award of \$4,691.74 in backpay to M. Crispino (TRX p. 41, line 57) as incorrect in light of the finding that Crispino had received that sum in overpayments (TRX pp. 24-25, 40; TRX Appendix). Resp. Br., Section I., page 7, Section V., pages 26-28.

15. The recommended award of \$2,227.65 in backpay to R. Hamidy (TRX p. 42, line 1) as incorrect in light of the finding that Hamidy had received this sum in overpayments (TRX pp. 24-25, 40; TRX Appendix). Resp. Br., Section I., page 7, Section V., pages 26-28.

16. The recommended award of \$4,142.79 in backpay to J. Longnecker (TRX p. 42, line 8) and the failure to find that the award to this individual should be \$2,735.58. Resp. Br., Section V., pages 26-28.

17. The recommended award of \$3,733.05 in backpay to H. Bradford (TRX p. 42, line 9) and the failure to find that the award to this individual should be \$2,550.88. Resp. Br., Section V., pages 26-28.

18. The recommended award of \$4,916.71 in backpay to A. Fusare (TRX p. 42, line 10) and the failure to find that the award to this individual should be \$3,892.01. Resp. Br., Section V., pages 26-28.

19. The recommended award of \$17,466.44 in backpay to J. Price (TRX p. 42, line 11) and the failure to find that the award to this individual should be \$16,232.22. Resp. Br., Section V., pages 26-28.

20. The finding that V. O'Leary was entitled to reinstatement and the recommended award of \$3,555.73 in backpay to this individual (TRX p. 15, lines 12-28; p. 42, line 15) and the failure to find that O'Leary was not entitled to reinstatement or backpay because of the lack of an available job. Resp. Br., Section II., pages 8-20, Section V., pages 26-28.

5 21. The finding that C. Fontes was entitled to reinstatement (TRX p. 15, lines 12-28; p. 42, line 16) and the failure to find that this individual was not entitled to reinstatement because of the lack of an available job. Resp. Br., Section II., pages 8-20, Section V., pages 26-28.

22. The finding that D. Lippert was entitled to reinstatement and the recommended award of \$1,379.68 in backpay to this individual (TRX p. 15, lines 12-28, p. 42, line 18) and the failure to find that Lippert was not entitled to reinstatement or backpay because of the lack of an available job. Resp. Br., Section II., pages 8-20, Section V., pages 26-28.

23. The recommended award of \$6,373.30 in backpay to H. G. Haueter (TRX p. 42, line 24) and the failure to find that the award to this individual should be \$6,443.61. Resp. Br., Section V., pages 26-28.

24. The recommended award of \$13,214.92 in backpay to E. Johnson (TRX p. 42, line 25) and the failure to find that the award to this individual should be \$15,185.11. Resp. Br., Section V., pages 26-28.

25. The recommended award of \$10,042.61 in backpay to C. W. Olson (TRX p. 42, line 31) and the failure to find that this individual was entitled to neither reinstatement or backpay. Resp. Br., Section IV., pages 23-26, Section V., pages 26-28.

26. The recommended award of \$5,117.06 in backpay to E. Mann (TRX p. 42, line 32) and the failure to find that the award to this individual should be \$5,297.46. Resp. Br., Section V., pages 26-28.

Respectfully submitted,

MARION B. PLANT

E. JUDGE ELLERKIN

WILLIAM R. IRWIN

BROBECK, PILLEGER & HARRISON

111 Sutter Street

San Francisco, California 94104

Attorneys for

Fibreboard Corporation

[Caption Omitted in Printing]

EXCEPTIONS OF EAST BAY UNION OF MACHINISTS,
LOCAL 1304, UNITED STEELWORKERS OF AMERICA,
AFL-CIO, AND UNITED STEELWORKERS OF AMERICA
AFL-CIO TO TRIAL EXAMINER'S INTERMEDIATE REPORT

The East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO (hereafter collectively referred to as "the Union") except to the Intermediate Report of Henry S. Sahn, Trial Examiner, issued on May 23, 1968.

A. Exceptions are taken to the following findings, conclusions of law and recommendations:

1) Page 6, l. 19-32: The conclusion that the Board found in its original or supplemental decision that the contract terminated on July 31, 1959.

2) Page 6, l. 33-49: The conclusion that the contract terminated by its own terms on July 31, 1959.

3) Page 6, l. 41-44: The conclusion that the "Witnesseth" clause of the contract is unambiguous.

4) Page 6, l. 53-55: The finding that there is agreement among the parties as to the average quarterly earning of all terminated employees during the one year base period (there is a dispute as to the base period earning as to one of the terminated employees, Arca).

5) Page 7, l. 53 - Page 8, l. 14: The finding that the rates determined by the 1959 contract had it remained in effect are excessive, unreasonable and unrealistic.

6) Page 8, l. 24-25: The finding that the employees of the independent contractor, who replaced the discharges, received a wage of \$4.00 per hour in January, 1965.

7) Page 8, l. 43-46: The finding that the rate paid the independent contractor's employees who took over the duties of the discharges is not entirely clear but appears to have been approximately \$4.00 per hour.

8) Page 8, l. 46-54: The finding that the independent contractor paid its employees time and a half for overtime and that the \$4.00 rate paid by the independent contractor is equivalent to what the independent contractor "was receiving as of January, 1965, which figure, in addition to a basic hourly rate, includes also overtime rates and fringe benefits".

9) Page 9, l. 2-7: The finding or conclusion that the negotiated rate contained in a contract concluded after the backpay period is relevant to the appropriate rate during the backpay period.

10) Page 9, l. 29-32: The finding that the wage rate paid by Respondent to ILWU Millwrights is the appropriate rate for computing backpay.

11) Page 9, l. 43 - Page 10, l. 2: The finding that the lack of wage increases for the ILWU Millwrights in 1959 or 1960 was due to a recognition by the ILWU that the discharges' rates under the "Fabco formula" were too high.

12) Page 10, l. 2-5: The finding that the company subcontracted the maintenance work to an independent contractor who paid a wage rate lower than that which had been paid to the discharges.

13) Page 10, l. 10-17: The finding that the rates paid to the ILWU Millwrights during the backpay period is a reliable and logical yardstick and the best measure of the rate the machinists would have received during the backpay period.

14) Page 10, l. 19-26: The finding that wage rates in the Foremost and Encinal Terminals contracts were relevant to determining the rate in Fibreboard during the backpay period.

15) Page 10, l. 26-28: The finding that cost of living increases were relevant to determining the rate in Fibreboard during the backpay period.

16) Page 10, l. 31-34: The finding that the rate in a contract executed in July, 1965, by the Union with Fibreboard is relevant to determining the rate in Fibreboard during the backpay period.

17) Page 10, l. 36 - Page 11, l. 1: The finding that the wage rates to be applied in the backpay period are the rates paid to the ILWU Millwrights.

18) Page 10, l. 42-46: The finding that Burke testified that the ILWU Millwrights received no wage increase in 1959 and 1960 because "he forgot all about them".

19) Page 11, l. 43-48: The finding that the ILWU tacitly recognized that the Union's machinists rate as of July 31, 1959, was excessive.

20) Page 11, l. 48-53: The finding that the Company subcontracted the maintenance work to an independent contractor at a wage rate less than that paid to the discharges under the "Pabco formula".

21) Page 12, l. 50-52: The finding or contention that the Union concedes that Swisher and Yoch were replacing Holmes and Jobe who were ill.

22) Page 12, l. 38-42: The finding or contention that the Union acknowledged that there was some elimination of work in the main machine shop as a result of changes in floor covering, linoleum and roofing.

23) Page 13, l. 19-21: The contention or suggestion that a position taken in a pretrial memorandum or during the pre-hearing conference, absent a formal stipulation, is relevant to determining the number of jobs available.

24) Page 15, l. 12-17: The finding or conclusion that the experience of the independent contractor from December 24, 1963, to January 22, 1965, is relevant to determining the number of jobs which would have been available to the discharges absent the sub-contracting.

25) Page 15, l. 15-17, l. 50-56: The finding that the number of maintenance men required to service the Martinez plant was five.

26) Page 15, l. 25-27: The finding, that there would have been 21 machinists jobs available for the discharges during the backpay period.

27) Page 15, l. 57-61: The finding that, absent the sub-contracting, there would have been no helpers jobs available for the discharges during the backpay period.

28) Page 18, l. 32-39: The finding that the General Counsel's argument concerning current-service benefits during the hiatus period is without merit or precedent.

29) Page 18, l. 44-49: The finding or conclusion that the General Counsel's and Union's arguments concerning pension credits are tantamount to a finding of backpay entitlement for the hiatus period and that this would violate the Board's backpay order.

30) Page 18, l. 53-60: The finding or conclusion that it is relevant in determining the entitlement to pension credits that the cost of the plan was borne in major part by the Company.

31) Page 18, l. 60 - Page 19, l. 3: The finding that no credit is received affecting the dollar amount of the pension during a break in service except for vesting early retirement.

32) Page 19, l. 3-4: The conclusion that pension credits for the hiatus credits must be disallowed.

33) Page 21, l. 37-41: The finding or conclusion that the testimony and report of Baldwin, which referred to events prior to August, 1957, was relevant to the pension agreement arrived at by the Union with Fibreboard in November and December, 1957.

34) Page 21, l. 41-49: The finding or conclusion that evidence relating to employees subject to collective bargaining agreements with other unions is relevant to establish the terms of the agreement reached between the Union and Fibreboard as to retirement dates for certain employees.

35) Page 22, l. 20-24: The finding that the compulsory retirement dates for the seven discharges in issue was other than January 1, 1963.

36) Page 22, l. 24-30: The failure to credit the testimony of Lloyd Ferber as to the oral agreement entered into as to compulsory retirement dates.

37) Page 22, l. 51 - Page 23, l. 4: The finding that the said oral agreement did not exist.

38) Page 23, l. 5-11: The finding that the listing of compulsory retirement dates for the said seven men as January 1, 1963, by Fibreboard's counsel was a "coincidental error".

39) Page 23, l. 22-25: The conclusion that the testimony of Ferber is not dispositive of the issue of the oral agreement, is not credited and is not "substantial evidence".

40) Page 23, l. 27-37: The conclusion that reliance on the oral agreement would violate the parole evidence rule.

41) Page 23, l. 39-43: The finding or conclusion that the deferred retirement section of the Retirement Plan is not applicable.

42) Page 23, l. 44-53: The finding that the compulsory retirement dates of the said seven men are as given.

43) Page 25, l. 2-7: The conclusion that to deny to Fibreboard the deduction of severance payments would penalize

Fibreboard by requiring it to pay twice to make an employee whole.

44) Page 25, l. 7-9: The conclusion that severance payments were given for "consideration" and that there was a failure of consideration.

45) Page 25, l. 9-11: The finding that severance payments should be deducted from gross backpay owing.

46) Page 26, l. 5-15: The finding or conclusion that the alleged threats described are relevant to the three discharges in issue, none of whom are shown to be involved in the making of the alleged threats.

47) Page 26, l. 28-29: The finding that the car which halted in front of Arca's truck on August 19th was pelted with solid objects.

48. Page 26, l. 41-43: The finding that Arca's truck rammed into an automobile on August 21st.

49. Page 27, l. 30-31: The finding that Beck gave a "head signal" toward the direction of a group of men.

50. Page 27, l. 40-42: The finding that Arca struck Hanger in the mouth.

51. Page 27, l. 59-61: The finding that Arca's and Beck's denial that Arca struck Hanger are not to be credited.

52. Page 33, l. 41-42: The finding that Arca's activities were violent and unprotected.

53. Page 33, l. 41-42: The finding that Beck's activities were violent and unprotected.

54) Page 33, l. 41-48: The finding or conclusion that it would better effectuate the purposes of the Act by not requiring the reinstatement of Arca and Beck.

55. Page 34, l. 7-12: The finding or conclusion that Arca's activities were unprotected and were unjustifiable violence.

56) Page 34, l. 7-12: The finding or conclusion that Beck's activities were unprotected and were unjustifiable violence.

57) Page 34, l. 7-13: The finding or conclusion that the Respondent Employer's conduct was non-provoking and was of an unaggravating nature and that its unfair labor practice was of a "technical nature".

58) Page 34, l. 16-19: The finding or conclusion that Arca's conduct was violent and unlawful and one sided on his part.

59) Page 34, l. 16-19: The finding or conclusion that Beck's conduct was violent and unlawful and one sided on his part.

60) Page 34, l. 30-31: The conclusion or recommendation that Arca and Beck be refused reinstatement and any backpay.

61) Page 38, l. 25-28: The finding and conclusion that Johnson did not make diligent and reasonable efforts to secure interim work during the backpay period.

62) Page 38, l. 33-38: The finding that Johnson had accelerated his retirement when he moved to Lake Tahoe.

63) Page 38, l. 40-45: The finding that investment income, which was also available before the unfair labor practice, is relevant to the issue of diligence in efforts to secure interim work.

64. Page 38, l. 45-50: The finding that prospective social security payments and an inchoate pension, both arising after the backpay period, are relevant to the issue of diligence in efforts to secure interim work during the backpay period.

65. Page 38, l. 45-50: The finding that Johnson was in the situation of not being obliged to resort to seeking diligently any other work.

66) Page 38, l. 50-51: The inference that Johnson lacked motivation and diligence in seeking work.

67) Page 38, l. 52 - Page 39, l. 1: The finding that Johnson's efforts to find work in the Bay Area were half-hearted and lackadaisical.

68. Page 39, l. 5: The finding or conclusion that Johnson's self-employment is not relevant in considering his diligence in seeking interim work.

69) Page 39, l. 6-7: The conclusion that Johnson removed himself from the labor market.

70) Page 39, l. 10-14: The finding or conclusion that Johnson was asked by the Union to return to his job only in connection with the matter of backpay and that his acceptance of reinstatement was only pro-forma.

71) Page 39, l. 17-21: The finding that Johnson's registration with the State Employment Agency and with the Union was a sham and not done sincerely.

72) Page 39, l. 28-30: The finding that Johnson's testimony as to efforts to find work were inconsistent, self-contradictory, unspecific and vague.

73) Page 39, l. 33-37: The finding that Johnson's testimony was incoherent, unimpressive, and purposely vague and obscure, that many statements were self serving, that much of his testimony was a maze of confusion, equivocations, improbabilities and inability to recall details.

74) Page 40, l. 23-30: The finding and conclusion that Johnson did not engage in a diligent effort to find work and is not entitled to backpay.

75) Page 40, l. 38-39: The finding that the early retirement of those terminated employees who are entitled to backpay was "voluntary".

76) Page 40, l. 34-43: The finding and conclusion that early retirement benefits received in the hiatus period (1959-1962) should be deducted from gross backpay.

77) Page 41, l. 1-41: The findings and conclusions contained in the resume which have been specifically referred to in the prior exceptions.

78) Page 41, l. 43 - Page 42, l. 41: The recommended order except for the provision therein that interest be paid.

79) Appendix A, pp. i to vi: The Appendix with the detailed computations there contained.

B. Exceptions are taken to the failure to make the following findings, conclusions of law and recommendations:

1. The failure to find that employees of the independent contractor who were doing the work of the discharges during the period from 1959 to 1965 were paid building trades millwrights' rates (T.935).

2. The failure to conclude that wage rates determined by the Pabco Wage Formula (Resp. Ex. 1, Sec. 1) are the appropriate rates for the computation of what would have been earned by the discharges in the period from July 1, 1959, through July 15, 1965.

3. The failure to conclude that the Board's Supplemental Decision which ordered Fibreboard to "restore the status quo ante" (G.C. Ex. 1(b), p.7) required that the Babco Wage Formula, which was in effect prior to Fibreboard's unfair labor practice, be the basis for determining the wage rates to be applied from July 1, 1959, through July 15, 1965.

4. The failure to find that the contract negotiated by the Union with Fibreboard, and effective from July 15, 1965, is irrelevant to the determination of wage rates which would have been in effect from July 1, 1959 to July 15, 1965, because it was the result of the Union's weak bargaining position due to Fibreboard's unfair labor practice, subject of this proceeding (T. 679-680, 847-848, 901-902).

5. The failure to find that from July 30, 1959, to January 18, 1965, Fibreboard refused to bargain with the Union about terms and conditions of employment, including subcontracting (U. Ex. 11, U. Ex. 12).

6. The failure to conclude that the decision of the California District Court of Appeal in the matter of Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 C.A. 2d 675, 39 Cal. Rptr. 64 (hearing den., Cal. Sup. Ct., Aug. 5, 1964) which held that the collective bargaining agreement between the Union and Fibreboard did not terminate on July 31, 1959, was binding on the parties as a collateral estoppel on the issue of the continued existence of the agreement after July 31, 1959 (G.C. Ex. 5, P. 95).

7. The failure to find or conclude that the Union notice of May 26, 1959 (Resp. Ex. 2) was a notice to modify, not

a notice to terminate, and did not prevent an automatic renewal of the Agreement (Resp. Ex. 1, witnesseth clause).

8. The failure to conclude that Fibreboard breached the collective bargaining agreement between the parties by refusing to negotiate in good faith as to those sections of the agreement open for modification in May to July, 1959. (U. Ex. 11, 12, Resp. Ex. 1, Witnesseth Clause).

9. The failure to find that the Pabco Wage Formula had been in collective bargaining agreements between the parties since 1949, was first proposed by Fibreboard and no changes in the Pabco Wage Formula were ever proposed. (T. 653, 666-667, 703, 846-847, U. Ex. 2)

10. The failure to find that the collective bargaining agreement between the parties was automatically renewed unchanged each year from August 1, 1959, to July 14, 1965 (T. 36-37).

11. The failure to conclude that the finding in the Board's first decision (G.C. Ex. 1(a)) that the contract between the parties terminated as of July 31, 1959 was wiped out by the Supplemental Decision of the Board (G.C. Ex. 1(b)).

12. The failure to find that the rates paid to the ILWU Millwrights in the period from 1946 to July 31, 1959, followed the rates negotiated by the Union in that period in a tandem relationship and while the rates independently negotiated by the Union for the discharges might be a useful guide to the rates due to the ILWU Millwrights, the reverse does not follow (T. 123).

13. The failure to find that the rates paid to the ILWU Millwrights in the 1959 through 1965 period were distorted by the confusion and litigation over the rates due to the discharges,

and are not a proper guide for the rates to be used in computing backpay (T. 123, 850-853).

14. The failure to find that, for at least two years prior to July 31, 1959, the wage rate voluntarily negotiated by Fibreboard with the Union on behalf of the discharges was at least 16% higher than the rate paid by other employers to maintenance machinists and, for this reason, after July 31, 1959, the rates paid by other employers is not a reasonable guide to the appropriate wage rates in the backpay period (U. Ex. 23, Resp. Ex. 7).

15. The failure to conclude that establishing any wage rate less than that determined by the Pabco Wage Formula would permit Fibreboard to profit from its unfair labor practice.

16. The failure to conclude that the burden was on the respondent to prove the affirmative defense of diminution of jobs and go forward with the evidence relevant thereto.

17. The failure to find that Fibreboard had produced no evidence (other than the stipulations to which it was a party) of actual physical changes or diminution of the flow of work to support its claim of a reduced number of jobs.

18. The failure to admit evidence as to the practice of the discharges working on capital construction and the failure to find that the discharges regularly worked on capital construction, reconstruction and alteration work of the sort done in Martinez prior to their discharge (T. 663-666).

19. The failure to find that the equivalent of two men's work in the roofing shop was available to the discharges during the backpay period. (T. 768, 778, 779, 782).

20. The failure to find that respondent did not produce evidence to establish that work was not available for the discharges during the backpay period even if evidence was produced of the number of jobs available (T. 411 et seq, T. 419 et seq, T. 489 et seq, Resp. Ex. 18) since turnover in these jobs would have allowed some backpay for all discharges. (New Eng. Tank Ind. 147 NLRB 598, 601.)

21. The failure to find that employees of the independent contractors worked under a different Union contract, having different rules as to work jurisdiction, guaranteed work week, hours of work, and overtime as compared to the discharges making the number of employees required by the independent contractor to do the work not comparable to the number of jobs which would be available to discharges (T. 221).

22. The failure to find that number of jobs filled by the independent contractor at Emeryville and Martinez was:

Aug. 1, 1959 to Mar. 1, 1962 -	22 jobs
Mar. 1, 1962 to Nov. 1, 1963 -	22 jobs
Nov. 1, 1963 to June 15, 1964 -	21 jobs
June 15, 1964 to Jan. 18, 1965 -	20 jobs
(U.Ex. 21, Resp. Ex. 18, T. 493, 494-495, 500)	

23. The failure to conclude that "current service credits" under the Fibreboard Retirement Plan which would have been accumulated during the "hiatus period" (July 1, 1959 to Sept. 13, 1962) are part of continuous service rights under the Board's order for reinstatement with no prejudice to "seniority rights and other privileges" rather than wages which would be disallowed by the Board's Supplemental Decision in this period. (G.C. Ex. 1(b), p. 9, Resp. Ex. 6, p. 26-27).

24. The failure to find that accumulation of "current service benefits" under Fibreboard's Retirement Plan (Resp. Ex. 6, p. 26-27) does not require payment by Fibreboard to the Plan related to the specific "current service benefits" accumulated, and are not, therefore, wages (Resp. Ex. 6, p. 39).

25. The failure to find that there was no obligation on Fibreboard to make any payments into the Retirement Plan on behalf of a member until, and only if, retirement is reached (Resp. Ex. 6, p. 39).

26. The failure to find, as an alternative to Exception B24, that payments by Fibreboard into the Retirement Plan are equivalent to wages, and the normal payments by Fibreboard to the Retirement Plan during the backpay period should have been added to the gross backpay in determining backpay due (T. 470-471).

27. The failure to find that the Retirement Income for those discharges retiring after July 1, 1959, should be computed on the basis of current service benefits which would have been accumulated during the hiatus period and the backpay period (U. Ex. 25, U. Ex. 28).

28. The failure to conclude that crediting the discharges for "current service benefits" for the hiatus period would not result in payment of wages for the hiatus period, and such benefits are not subject to the tolling of backpay in the hiatus period.

29. The failure to conclude that the Fibreboard Retirement Plan permits a deferred retirement under Section 18 thereof, and that such an agreement could be entered into by

Thumann, Fibreboard's Director of Industrial Relations, on behalf of Fibreboard (Resp. Ex. 6, p. 33, T. 669, 836).

30. The failure to conclude that the oral agreement entered into by the Union and Fibreboard to permit eight men to continue working until January 1, 1963, was not in conflict with the provisions of the Fibreboard Retirement Plan.

31. The failure to find that in November, 1958, Fibreboard and the Union entered into an oral agreement to permit eight men who were between 60 and 65 years of age on January 1, 1958, to continue working until January 1, 1963 (T. 669, 672, 817-818, U. Ex. 16, Resp. Ex. 28).

32. The failure to find that listing the retirement date of January 1, 1963, for the eight men in issue while listing the correct and uncontroverted retirement date for all other discharges in U. Ex. 16 and U. Ex. 17 is more than coincidental error, but rather an indication that Fibreboard's records (Resp. Ex. 28) showed January 1, 1963 as the correct retirement date for the eight men.

33. The failure to conclude that the retirement date of January 1, 1963, for the eight men in issue as shown on U. Ex. 16, U. Ex. 17 and Resp. Ex. 28 were an admission against interest that the retirement date for these men agreed by Fibreboard was January 1, 1963.

34. The failure to find that the testimony of Baldwin (T. 788 et seq) and Resp. Ex. 23 was irrelevant to the issue of the oral agreement as to retirement dates for the eight men because the testimony and exhibit concerned events prior to August, 1958, and the oral agreement was concluded in November, 1958.

35. The failure to find that the Resp. Ex. 24(a), 24(b), 25, 26, and 27 are not entitled to weight because they are not relevant to the issue, are inconsistent and implausible.

36. The failure to conclude that severance pay, received in August, 1959 and applying to a period for which backpay is not due, should not be deducted from gross backpay due for the period from September, 1962, to January, 1965.

37. The failure to find that Fibreboard never raised the alleged misconduct of Arca, Beck and Olson at any prior Board or Court proceeding at which reinstatement was ordered for all dischargees including these three (T. 516, G.C. Ex. 1(c), G.C. Ex. 1(e)).

38. The failure to find that the Board, in the Supplemental Decision of September 13, 1962, in the instant case (G.C. Ex. 1(b)) ordered reinstatement to all dischargees, including Arca, Beck and Olson.

39. The failure to conclude that Fibreboard was precluded from introducing evidence or raising argument to limit reinstatement of any dischargees since the issue was not raised in the original proceeding before the Board or before the Court of Appeals.

40. The failure to rule that the transcripts of an earlier State Court contempt proceeding (Resp. Ex. 12) were inadmissible into evidence after objection by the General Counsel and Union. (T. 247 et seq)

41. The failure to find that on August 19th, Beck requested the identity of the two strangers who approached the picket line (later identified as Hanger and Parker) pursuant to

an agreement with a Fibreboard official that he identify those coming into the plant (T. 539-540).

42. The failure to find that Parker, one of the two strangers who approached Beck on the picket line on August 19th, brushed aside Beck's hand, which was raised to halt Parker to obtain identification (T. 542).

43. The failure to find that Beck was not responsible for the movement of a group of men from the side of the road to a position around Beck and two strangers at the picket line on August 19th (T. 542-543).

44. The failure to find that Arca's truck was run into by the second car in a caravan of cars which approached the Fibreboard plant on August 21st (T. 322, 331, 587).

45. The failure to conclude that the misconduct of Arca and Beck, if it occurred, when weighed against the unfair labor practices and other provocations of Fibreboard, are not serious enough to justify a refusal to reinstate, and that it would not effectuate the purposes of the Act to deny reinstatement to Arca and Beck.

46. The failure to conclude that Fibreboard had admitted in its answer (G.C. Ex. 1(q), p. 15) that F. C. Johnson is entitled to backpay and therefore no evidence was admissible in this proceeding on the issue of Johnson's entitlement to backpay.

47. The failure to conclude that Johnson made an honest good faith attempt to find work in the backpay period, and, in fact, had succeeded in so doing, and had not willfully incurred a loss of earnings (T. 221-231).

48. The failure to find that Johnson's move to Tahoe to engage in the construction business was not a removal from the labor market and was justified by Johnson's difficulty in finding work in the Bay Area because of his age and lack of skill (T. 221-231).

49. The failure to conclude that pensions received in the hiatus period (from 1959 to 1962) are not a proper deduction from gross backpay due in the backpay period from September 1962 through January 18, 1965.

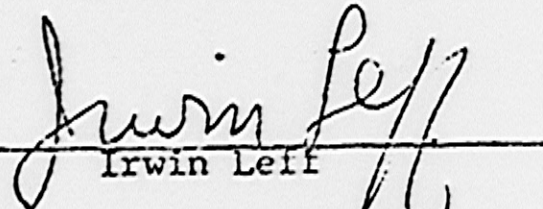
San Francisco, California

August 16, 1968

Respectfully submitted,

DARWIN, ROSENTHAL & LEFF

By


Irwin Leff

Attorneys for the Union



NATIONAL LABOR RELATIONS BOARD

REGION 20

450 Golden Gate Avenue, Box 36047

San Francisco, California 94102

Telephone 556- 6137
Area Code 415

Ogden W. Fields, Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D.C. 20570

September 17, 1968

Re: Fibreboard Paper Products Corporation
Case No. 20-CA-1682

Dear Mr. Fields:

Counsel for the General Counsel requests that the following corrections be made in his Exceptions to Trial Examiner's Backpay Decision and Brief to the Board in Support of Exceptions to Trial Examiner's Backpay Decision heretofore submitted in this matter:

	<u>Page and Line</u>		<u>Is</u>	<u>Should be</u>
Exceptions	7	29	owning	owing
	12.	9	No. 82	No. 80
Brief	2	7	compalint	complaint
	12	30	approximately	<u>approximately</u>
	17	8	Benefits	Credits
	17	14	date of the	date of the Board's Supplemental Decision to the date of
	17	26	benefits	credits
	18	5	benefits	credits
	19	30	benefits	credits
	20	14	election	electing
	21	11	benefits	credits
	21	14	benefits	credits
	21	18	benefits	credits
	21	20	benefits	credits
	25	30	footnote 23,	footnote 24,

	<u>Page and Line</u>	<u>Is</u>	<u>Should be</u>
Brief	36 22	niether	neither
	39 28	Brief 76	Brief to Trial Examiner, p. 76
	41 27	Trial Examiner	Board
	47 12	returement	retirement.

Very truly yours,

William F. Roche

William F. Roche
Counsel for the General Counsel

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing letter has been mailed this 17th day of September, 1968, to the following:

Irwin Leff, Esq.
Darwin, Rosenthal & Leff
68 Post Street
San Francisco, California 94104

R. C. Thumann, Director of Industrial Relations
Fibreboard Paper Products Corp
1789 Montgomery Street
San Francisco, California

Marian B. Plant, Esq.
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

Lloyd H. Ferber,
Local 1304, United Steelworkers of America,
AFL-CIO
3637 San Pablo Avenue, Emeryville, California

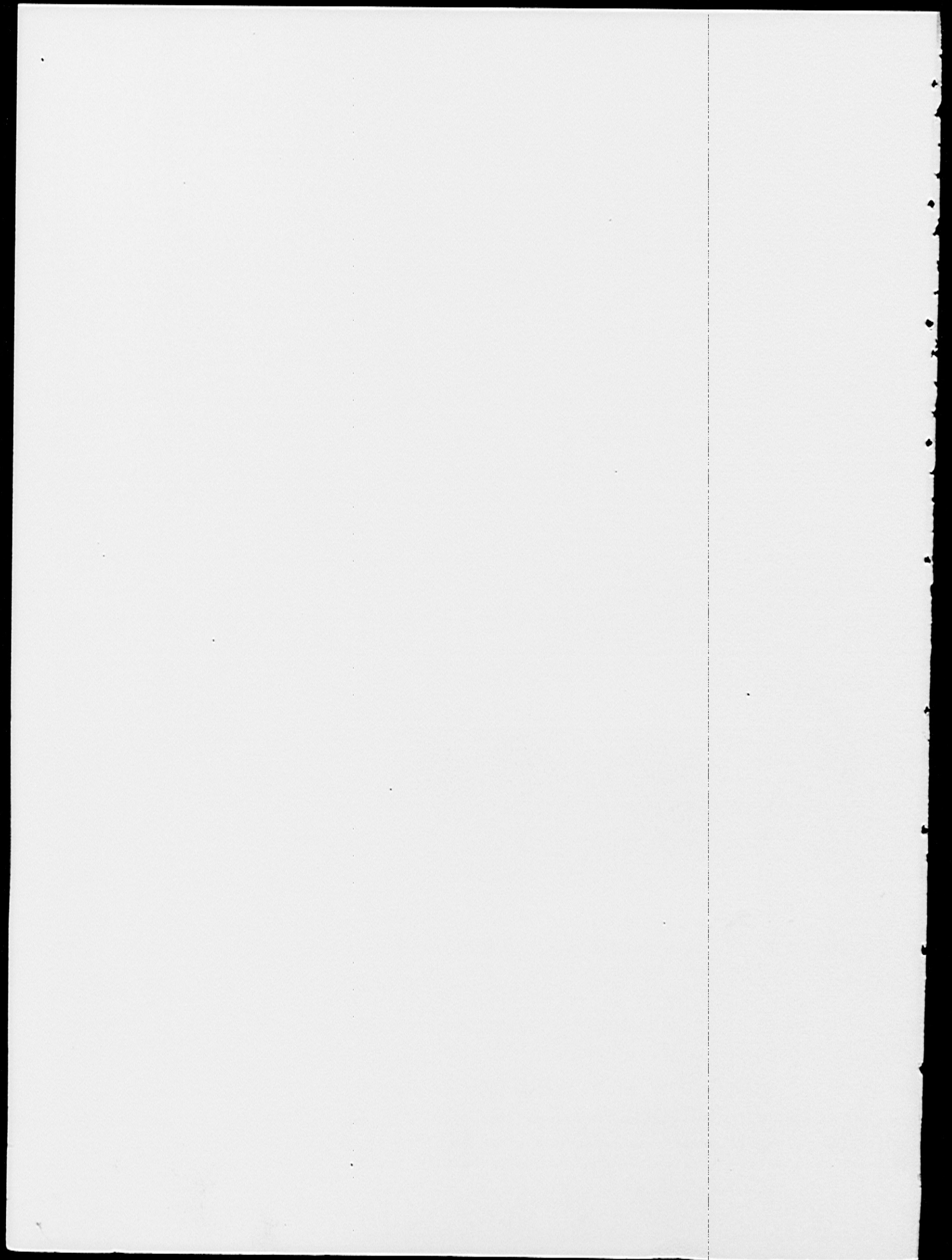
Feller, Bredhoff, Anker & Gottesman
1001 Connecticut Avenue, N.W.
Washington, D. C.

William F. Stumpf, United Steelworkers of America, AFL-CIO
610 - 16th St., Oakland 12, California

Gerard D. Reilly, Esq.
1120 Tower Building
Washington, D. C.

William F. Roche

William F. Roche
Counsel for the General Counsel



BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 23,853

United States Court of Appeals
for the District of Columbia Circuit

FIBREBOARD CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

FILED AUG 13 1970

Nathan J. Paulson
CLERK

ON PETITIONS TO REVIEW AND CROSS-PETITION TO ENFORCE AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Of Counsel:

Bernard Kleiman
10 South LaSalle Street
Chicago, Illinois 60603

Jay A. Darwin
68 Post Street
San Francisco, California

Michael H. Gottesman
Bredhoff, Gottesman & Cohen
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for United Steelworkers
of America, AFL-CIO

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 23,853

FIBREBOARD CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITIONS TO REVIEW AND CROSS-PETITION TO ENFORCE AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Of Counsel:
Bernard Kleiman
10 South LaSalle Street
Chicago, Illinois 60603

Jay A. Darwin
68 Post Street
San Francisco, California

Michael H. Gottesman
Bredhoff, Gottesman & Cohen
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for United Steelworkers
of America, AFL-CIO

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT PURSUANT TO RULE 8(d).....	1
STATEMENT OF THE CASE.....	2
The Initial Fibreboard Proceedings.....	2
The Instant Backpay Proceeding.....	4
ARGUMENT.....	5
I. THE COMPANY FAILED TO MEET THE BURDEN OF ESTABLISHING A DIMINUTION OF JOBS IN THE BACKPAY PERIOD (OTHER THAN THAT STIPULATED BY THE PARTIES), AND THE BOARD ERRED IN HOLDING THAT IT HAD.....	5
A. The Burden of Proving Job Diminution Is on the Company.....	7
B. The Board Applied an Impermissible Formula in Finding Job Diminution Solely on the Basis of the Experience of the Independent Contractors.....	10
C. In Any Event, the Evidence of Reduced Jobs under the Independent Contractors Was Incompetent.....	14
II. THE BOARD ERRED IN FINDING THAT THE COMPULSORY RETIREMENT DATES OF SEVEN EMPLOYEES OCCURRED PRIOR TO JANUARY 1, 1963.....	19
CONCLUSION.....	23

TABLE OF CITATIONS

Cases	Page
Bay Standard Products Mfg. Co., 167 NLRB No. 44.....	15
Bechtel Corp., 141 NLRB 844.....	15
Borg-Warner Controls, 128 NLRB 1035.....	15

Cases	Page
Cusano, d/b/a American Shuffleboard Co. v. NLRB, 140 F.2d 989 (C.A. 3).....	15
*Fibreboard Paper Products Corp., 138 NLRB 550 (1962), enforced 116 U.S. App. D.C. 198, 322 F. 2d 411 (1963), affirmed 379 U.S. 203 (1964).....	2
Forest Industries, 164 NLRB No. 145.....	15
Jack G. Buncher d/b/a The Buncher Co., 164 NLRB No. 31, enforced 405 F. 2d 787 (C.A.3).....	9, 10
Ironworkers Local 600 (Bay City Erection Co.), 134 NLRB 301...	15
Majestic Molded Products, Inc. v. NLRB, 330 F. 2d 603, 606 (2d Cir., 1964).....	19
Nabors v. NLRB, 323 F. 2d 686 (C.A. 5).....	8
New England Tank Industries, 147 NLRB 598.....	17
*NLRB v. Biscayne Television Corp., 337 F. 2d 267 (C.A. 5).....	9, 11, 13
NLRB v. Brown & Root, Inc., 311 F. 2d 447 (C.A. 8).....	7, 8, 9
NLRB v. Cambria Clay Products, 215 F. 2d 48 (C.A. 6).....	8, 9
*NLRB v. Charles Toppino and Sons, Inc., 358 F. 2d 94 (C.A. 5).	9, 12
NLRB v. Ellis & Watts Products, Inc., 344 F. 2d 67 (C.A. 6)...	8, 9
NLRB v. Fleetwood Trailer Co., 389 U.S. 375.....	11
NLRB v. Interurban Gas Co., 354 F. 2d 76 (C.A. 6).....	8
NLRB v. J. G. Boswell Co., 136 F. 2d 585 (C.A. 9).....	8
NLRB v. Mastro Plastics Corp., 354 F. 2d 170 (C.A. 2).....	9, 19
NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569 (C.A. 5)..	8, 16, 17
NLRB v. Mooney Aircraft, Inc., 366 F. 2d 809 (C.A. 5).....	8, 19
NLRB v. Plastilite Corp., 375 F. 2d 343 (C.A.).....	9
NLRB v. Reed & Prince Mfg. Co., 130 F. 2d 765 (C.A. 1).....	9
Phelps Dodge Corp. v. NLRB, 313 U.S. 177.....	8
Satilla Rural Electric Membership Corp., 129 NLRB 1084.....	15

Cases	Page
Snow v. NLRB, 308 F. 2d 687 (C.A. 9).....	9
Trinity Valley Iron & Steel Co., 158 NLRB 890.....	11, 18, 19

*Cases principally relied upon are marked with an asterisk

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Board's conclusion that there were ten fewer jobs available during the backpay period than claimed by the Union was legally erroneous and not supported by substantial evidence.

2. Whether the Board's conclusion that the "compulsory retirees" would have been retired prior to January 1, 1963, was arbitrary and capricious and not supported by substantial evidence.

STATEMENT PURSUANT TO RULE 8(d)

This case was previously before this Court. See Fibreboard Paper Products Corp., 138 NLRB 550, enforced 116 U.S. App. D. C. 198, 322 F. 2d 411 (1963).

STATEMENT OF THE CASE

This case involves the backpay proceeding which followed the famous Fibreboard decision: Fibreboard Paper Products Corp., 138 NLRB 550, enforced 116 U.S. App. D.C. 198, 322 F. 2d 411 (1963), affirmed 379 U.S. 203 (1964).

The Initial Fibreboard Proceedings

On July 30, 1959, the Company unilaterally subcontracted work which formerly had been done by fifty-three of its own maintenance employees. The employment of these fifty-three employees -- constituting an entire bargaining unit -- was terminated. Their Union had been afforded no prior notice that their work was to be subcontracted, nor an opportunity to bargain about this climactic event. The Union filed charges with the NLRB alleging, inter alia, that the Company's failure to bargain with the Union before deciding to subcontract the work violated Section 8(a)(5) of the Act.

The Board initially held that the Company's action did not violate the Act, 130 NLRB 1558 (1961). However, the Union filed a petition for reconsideration, and on reconsideration the Board held that the Company "violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the [Union] over its decision to do so." 138 NLRB 550, 554.

In formulating a remedy for this violation, the Board stated, "Since the loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action." 138 NLRB at 555. Accordingly, the Board's order directed the Company, inter alia, to:

"Reinstate the maintenance operation previously performed by its employees represented by [the Union], and offer to those employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them in the manner set forth in the section above entitled 'The Remedy' (138 NLRB at 556).

In the section entitled "The Remedy", the Board stated, "Backpay shall be based upon the earnings which they normally would receive from the date of this ... Order to the date of Respondent's offer of reinstatement, less interim earnings ..." 138 NLRB at 555. In a footnote, the Board explained that it was departing from its usual procedure -- commencing backpay with the date the violation occurred -- because of "the special circumstances of this case where the Board, upon reexamination of the relevant legal principles, has reversed its own prior determination that Respondent had not by its conduct violated the Act ..." 138 NLRB at 555, n. 21.

This Court enforced the Board's decision and order, and the Supreme Court expressly affirmed both the finding of violation and the remedy which the Board prescribed for that violation.

The Instant Backpay Proceeding

Following the affirmance of the Board's decision and order, it became necessary to establish the precise amount of monies and benefits to which each of the employee-victims was entitled under the Board's order. The traditional mechanism for making such determinations, absent agreement thereon among the parties, is an NLRB backpay proceeding. Such a proceeding was initiated in the instant case on August 17, 1967, when the Acting Regional Director for the Twentieth Region issued a backpay specification and notice of hearing.

There were ten disputed issues at the hearing, and the Trial Examiner ruled on all ten in a manner adverse to the Union. The Board, in the Supplemental Decision and Order under review in the instant proceeding, sustained the Union's exceptions to the Trial Examiner on seven of the issues, but affirmed the Trial Examiner on three.

The Company has petitioned to review those issues upon which the Board reversed the Trial Examiner. As to these issues, we believe the Board's decision is correct and that its or-

der should be enforced.

Our petition for review is directed to two of the issues upon which the Board affirmed the Trial Examiner.

The facts relevant to these two issues are discussed in conjunction with the argument herein.

ARGUMENT

- I. THE COMPANY FAILED TO MEET THE BURDEN OF ESTABLISHING A DIMINUTION OF JOBS IN THE BACKPAY PERIOD (OTHER THAN THAT STIPULATED BY THE PARTIES), AND THE BOARD ERRED IN HOLDING THAT IT HAD.

The most important issue raised by the Union's petition for review relates to the number of jobs available in the backpay period (i.e. the period subsequent to the Board's order during which the employees would have been employed but for their unlawful termination). At the time of the subcontracting there were jobs for fifty-three employees. Absent some supervening event, it would be expected that fifty-three jobs were available during the backpay period, and that accordingly each of the wrongfully terminated employees would be entitled to reinstatement and backpay.

The Board recognizes, however, that in some situations there develops a diminution of work during the backpay period so that, even if employees had not been terminated unlawfully, not all of them would have worked during that period. In such

situations, the Board awards reinstatement and backpay only to those for whom jobs would have been available.

In this case, it was stipulated that twelve of the fifty-three jobs were eliminated prior to the commencement of the backpay period as a result of changes in the Company's operations; ^{1/} that another five were eliminated on January 15, 1964; ^{2/} and still another five on October 21, 1967. ^{3/}

The Union, and the Board's General Counsel, contended

^{1/} The employees were terminated on July 30, 1959, and the backpay period commenced on September 14, 1962 (the day after issuance of the Board's order). During the interim, the following events resulted in the elimination of twelve jobs: On October 1, 1960, the Company discontinued its felt base and printed floor covering operation, thus eliminating two jobs (Tr. 11). On July 1, 1961, the Company discontinued its linoleum operation, thus eliminating ten jobs (Tr. 11, 176; Schedule 2, Appendix to Amended Answer, G.C. Exh. 1-R). In November or December, 1961, the central storehouse was demolished, eliminating one job (Tr. 32, 176). And on March 1, 1962, the Company moved its roofing operation to a new plant in Martinez, resulting in the addition of one job (Schedule 2, Appendix to Amended Answer, G.C. Exh. 1-R).

^{2/} On January 15, 1964, the installation of automatic controls in the Power House resulted in the elimination of five jobs (Tr. 122).

^{3/} On October 21, 1967, the Power House was discontinued, eliminating five jobs (Tr. 762).

that the remainder of the jobs were available (i.e. 41 jobs at the start of the backpay proceeding, 36 jobs after January 15, 1964, and 31 jobs after October 21, 1967).

The Board, however, concluded that there were ten fewer jobs available (i.e. 31 jobs at the start of the backpay period, etc.)^{4/} It reached this result by a process of reasoning which we believe to be defective as a matter of law. In the first place, the Board used an impermissible formula to derive the number of available jobs. In the second place, the Board relied upon incompetent evidence in applying the formula.

We demonstrate each of these errors herein. First, however, in order to place the issue in proper perspective, it is necessary to know that the burden of proving job diminution was on the Company.

A. The Burden of Proving Job Diminution Is On
The Company.

In backpay proceedings the issue for determination is the extent of the employer's liability for its unfair labor practices, and the courts have consistently required the employer to carry the burden of proof in mitigating its liability. This allocation of the burden is aptly expressed in NLRB v. Brown & Root,

^{4/} The "31" represents 10 jobs in the powerhouse which were not in dispute (Supp. D. & O. page 9) plus 21 jobs which the Board found to be available for maintenance machinists (Id., page 12).

Inc., 311 F. 2d 447, 454 (C.A. 8) as follows:

"... in a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability."

Accord: NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569, 575-576 (C.A. 5); NLRB v. Mooney Aircraft, Inc., 366 F. 2d 809, 812-813 (C.A. 5); Nabors v. NLRB, 323 F. 2d 686, 692 (C.A. 5); NLRB v. Interurban Gas Company, 354 F. 2d 76, 77 (C.A. 6); NLRB v. Ellis & Watts Products, Inc., 344 F. 2d 67, 69 (C.A. 6); NLRB v. Cambria Clay Products, 215 F. 2d 48, 56 (C.A. 6); NLRB v. J. G. Boswell Co., 136 F. 2d 585, 597 (C.A. 9). Cf. Phelps-^{5/}Dodge Corp. v. NLRB, 313 U.S. 177, 189-200.

In particular, it is well established that the burden of proving the affirma-

^{5/} Although the General Counsel is required to present only the "gross amounts of backpay due", he customarily goes further, pursuant to Section 102.53 of the Board's Rules and Regulations, as he did in this case, and includes in the backpay specification a deduction from gross backpay of all those amounts in mitigation which he has discovered through personal interviews, social security records, etc. It does not follow, however, that the General Counsel, nor the Union aligned with him as a party, "assumes the burden of establishing the truth of all of the information supplied or of negating matters of defense or mitigation." NLRB v. Brown & Root, Inc., 311 F. 2d 447, 454 (C.A. 8).

tive defense of diminution of jobs rests on the employer, NLRB^{6/}
v. Mastro Plastics Corp., 354 F. 2d 170 (2d Cir., 1965), as
does the burden of going forward with evidence on this issue.
The rationale for placing this burden on the employer is that
he is more likely to have the books and records that will show
the changes in his work level and his employment needs (ibid).

This burden is not met by "mere self-serving and conclu-
sionary statements" of a reduction in jobs. Jack G. Buncher d/b/a
The Buncher Co., 165 NLRB No. 31 is a case in many respects simi-
lar to ours. In that case the Trial Examiner's backpay decis-
ion, adopted by the Board, elaborated on the employer's burden
of proof:

"To sustain an affirmative defense that discriminatees
would not have been retained in its employ because of
an economic reduction in force following the date of
discrimination, an employer must come forth with clear
and convincing evidence to support its contentions.
'[M]ere self-serving and conclusionary statements' that
an employer would have laid off or refused to recall back-
pay claimants for non-discriminatory reasons cannot op-

6/ Accord: NLRB v. Plastilite Corp., 375 F. 2d 343, 348;
NLRB v. Charles Toppino and Sons, Inc., 358 F. 2d 94, 96;
NLRB v. Mooney Aircraft Inc., 366 F. 2d 809, 812-813;
Nabors v. NLRB 323 F. 2d 686, 690; NLRB v. Biscayne Tele-
vision Corp., 337 F. 2d 267 (C.A. 5); NLRB v. Brown & Root,
Inc., 311 F. 2d 447, 453-454; NLRB v. Cambria Clay Pro-
ducts, 215 F. 2d 48, 56; Snow v. NLRB, 308 F. 2d 687, 695;
NLRB v. Ellis and Watts Products, Inc., 344 F. 2d 67, 69;
NLRB v. Reed & Prince Mfg. Co., 130 F. 2d 765, 768 (C.A. 1).

erate to deprive them of their remedial rights. [See W. C. Nabors Company, 134 NLRB 1078, 1088]. And, if any uncertainty exists concerning the availability of work for discriminatees, this flows from the employer's illegal actions and is to be resolved against him rather than the victims of those actions. [See Ozark Hardware Company, 119 NLRB 1130, 1133, enf'd 282 F. 2d 1 (C.A. 8)]." (Footnotes omitted)

The Court of Appeals for the Third Circuit in affirming the Board, stated in Buncher v. NLRB, 405 F. 2d 787 (1968) cert. denied, 90 S.Ct. 77, at p. 789:

"Where it has been established, as here, that an employer has discharged employees discriminatorily, but it asserts in mitigation of backpay claims that such employees would have been laid off even absent such discrimination, it has the burden of proving that fact."

B. The Board Applied An Impermissible Formula In Finding Job Diminution Solely On The Basis Of The Experience Of The Independent Contractors.

Fibreboard's entire case for a reduction of jobs beyond the number stipulated, and the sole basis for the Board's ultimate finding that there were ten fewer jobs available then contended by the Union (TXD p. 15, 1.12-27; D.&O., p. 9-13), is evidence purporting to show that the independent contractors to whom Fibreboard unilaterally and unlawfully subcontracted the maintenance work used a smaller number of men.

Fibreboard produced no evidence of actual physical changes or diminution of the flow of work to support its claim of a reduced number of jobs beyond that stipulated. Fibreboard produced no evidence that its order book decreased, reducing pro-

duction with a concomitant reduction of maintenance. Fibreboard produced no evidence of the physical removal of machines. Fibreboard produced no evidence of the introduction of new technology or automation which reduced the need for maintenance. The only evidence produced by Fibreboard to support the reduction of jobs beyond those stipulated was evidence that the contractors used fewer men to do the same amount of work. The Board concluded that this evidence was sufficient to justify the reduction. In doing so, the Board committed plain legal error.

An employer who denies reinstatement and/or backpay to the victims of his unfair labor practices on the ground that it needs only a smaller work force, has the burden of proving that, as claimed, the reduction in workforce was the result of "legitimate and substantial business justifications." NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380. It does not suffice merely to show that the employer "carried on successfully with a reduced workforce" for this "proves only that [the employer] realized an economic dividend from its antiunion activity." NLRB v. Biscayne Television Corp., 337 F. 2d 267, 268 (5th Cir., 1964). The employer must show "changed circumstances justifying a reduction," Trinity Valley Iron & Steel Co., 158 NLRB 890, 896, enforced in part 410 F. 2d 1161 (5th Cir., 1969) (emphasis added), not merely that there has been a reduction. "[T]he burden of establishing such changed circumstances rests on the [employer]." (ibid).

"The mere fact that ... respondent may not have had as many employees in the block plant as previously does not establish that economically motivated discharges unrelated to union activity would have occurred during the backpay period." NLRB v. Charles Toppino & Sons, Inc., 358 F. 2d 94 (5th Cir., 1966).

The reasons for this rule are evident. Any number of factors might explain why an employer can get along with fewer new employees. Thus, the unlawfully terminated employees might have been older, and the new employees younger and more vigorous. As a result, the employer might get the same results with a smaller number of employees. It hardly follows, however, that had the original employees not been terminated, the employer would have been able to reduce his workforce. In the instant case, there is an even more obvious explanation. Fibreboard had decided to subcontract the work to independent contractors precisely because the contractors had warranted that they had techniques of "preplanning and scheduling" which would enable them to reduce the workforce. 379 U.S. at 206. There is no reason to assume that had Fibreboard continued to do the work with its own employees it would have been able to secure such a workforce reduction. On the contrary, Fibreboard explained that it had been unable to achieve such workforce reductions with its own employees, and that is why it decided to contract out. 379 U. S. at 207.

Plainly, if Fibreboard had not unlawfully terminated its employees it would not have reduced its workforce as the independent contractors did. Since the stated purpose of the Board's original order was to make the terminated employees "whole for any loss of pay suffered by them", it is evident that the key question is how many of the terminated employees would have worked but for the Company's violation, not how many employees the independent contractors used. As the Fifth Circuit explained in Biscayne Television, supra, the employer does not sustain his burden by showing that he "carried on successfully with a reduced workforce", for this "proves only that [the employer] realized an economic dividend from its antiunion activity." 337 F. 2d at 268.

Fibreboard's burden was to show not only that it used fewer people, but that legitimate and substantial business reasons actually account for the reduced workforce. With respect to the ten jobs in dispute, Fibreboard failed utterly to do so. (Contrast the jobs which the parties stipulated were eliminated, supra, notes 1-3, for which economic explanations were readily apparent).

The Board's decision, accepting Fibreboard's ten-job reduction claim, thus is not supported by substantial evidence. There being no evidence of "changed circumstances justifying a reduction," the ten-job reduction cannot stand.

C. In Any Event, The Evidence of Reduced Jobs
Under The Independent Contractors Was In-
competent.

We have shown above that the Board erred in basing a holding of job reduction solely on evidence that the independent contractors used fewer employees. For that purpose we assumed, arugendo, that Fibreboard had indeed proved that the contractors used fewer employees. As we now show, Fibreboard did not even establish that fact by competent evidence.

Fibreboard presented no representatives of the contractors who could testify from firsthand knowledge or from original business records about the number of jobs. Its witnesses were its own employees, who responded to leading questions, frequently ^{1/} in a confused and shifting manner.

A record of man hours worked by the contractors' employees was offered for only 13 of the 28 months of the backpay period (U. Exh. 21), and then only for part of the Emeryville operations. No books or records were offered with respect to the Martinez operation (Tr. 465) and no claim was made that records for both operations for the entire backpay period were unavailable. On the contrary, Fibreboard's counsel at one point conceded that "the rest [of the records] are all down south somewhere" (Tr. 456) and later stated that "...the contractor's re-

^{1/} Compare, for example, the testimony of Maffey on p. 438 of the transcript, 1.12-18, with the Transcript, p. 439, 1.5-9.

records are all in Los Angeles" (Tr. 883), a one hour plane ride from the hearing site. The failure to produce records in its possession and control, or records available from its contractors, amply justifies an inference that such records would not support Fibreboard's position with respect to job diminution. ^{8/}

The Board itself acknowledged the unsatisfactory nature of Fibreboard's evidence. The Board found "merit" in the General Counsel's and Union's attacks upon the competency of the fragmented records which were introduced, and expressly stated that it had "utilized this evidence only for the limited purpose of providing a means by which to check the accuracy of the testimony of Respondent's witnesses." (D.&O., p. 11). As to the witnesses' testimony, the Board said: (D.&O., page 11, n. 15)

"The General Counsel contends that testimony of Respondent's witnesses with respect to the number of employees used by the independent contractor, was not only vague and shifting, but was also secondary in nature (i.e. no representative of the subcontractors was called to testify from firsthand knowledge or from original business records). We agree that it would have

8/ A litigant's unexplained failure to offer material evidence or to call material witnesses warrants the inference that if he adduced such evidence or testimony, it would not support his position. Cusano, d/b/a American Shuffleboard Company v. NLRB, 190 F.2d 989, 902 (C.A. 3); Bay Standard Products Mfg. Co., 167 NLRB No. 44; Forest Industries, 164 NLRB No. 145; Swift & Co., 159 NLRB 1233; Bechtel Corp., 141 NLRB 844; Ironworkers Local 600 (Bay City Erection Co.), 134 NLRB 301; Satilla Rural Electric Membership Corp., 129 NLRB 1084; Borg-Warner Controls, 128 NLRB 1035.

been better for the Respondent to have called a representative of the independent contractor for such testimony. We also agree that the witnesses' testimony was at times vague and uncertain; however, the fact remains that the testimony was uncontradicted on the record. We therefore do accept this testimony, but the weight we give it is affected by its nature. (see New England Tank Industries, 147 NLRB 596)."
(Emphasis supplied)

By what legerdemain does "vague and uncertain testimony" acquire that kind of validity as to require contradiction by the Union or the Board's General Counsel? The evidence was within Fibreboard's knowledge and control. Nothing short of magic could have enabled the Union to "contradict" invalid evidence in the face of Fibreboard's:

1. Production of only 13 of 28 months of the independent contractor's record of man-hours worked during the backpay period, and then only for part of the operation;
2. Failure to produce any witnesses who worked for the independent contractors, or to explain the absence of such witnesses; and
3. Failure to bring original books and records for the entire 28 months of the backpay period, or to explain its failure to do so.

Fibreboard has obviously failed to resolve the uncertainty inherent in the evidence which it did produce. In these circumstances, the uncertainty of the evidence must be resolved against Fibreboard, the wrongdoer. As the Fifth Circuit stated in NLRB v. Miami Coca-Cola Co., 360 F.2d 569, 572-573 (C.A.5):

"The respondent argues that the General Counsel's inability to carry the burden of proof decides the issue.

But the Board has, as a matter of policy -- one that seems reasonable -- consistently taken the view that when an employer's unlawful discrimination makes it impossible to determine whether a discharged employee would have earned backpay in the absence of discrimination, the uncertainty should be resolved against the employer. Merchandise Press, Inc., 115 NLRB 1441, 1332 (1956); Spitzer Motor Sales, 102 NLRB 437, 453 n. 52 (1953)."

Conceding "that it would have been better for the Respondent [Fibreboard]" to have presented evidence which "was not vague and shifting", the Board decided nevertheless to "accept this testimony" acknowledging that "the weight" of the testimony "is affected by its nature", citing New England Tank Industries, 147 NLRB 598, as justification for its ruling. But New England Tank lends no support to the Board's acceptance of and reliance upon this testimony. The very opposite is true, viz:

"The burden on Respondent to prove, as to each backpay claimant, that he would not have had work for reasons unconnected with the discrimination practiced against him, is not met by the sort of general evidence herein, which at best permits only conjecture that some claimants would not have had work for some part of the period for which backpay is claimed. Accordingly, we conclude that Respondent has not shown that the net backpay claimed in the backpay specifications is erroneous." (147 NLRB at 602).

The burden of proof was Fibreboard's, not the Union's. Yet the Board, in effect, placed the burden on the Union. The Board accepted the disputed evidence proffered by Fibreboard not because it was clear and certain (for it was not), nor be-

cause it was the best evidence respondent could have offered (for it was not), but because it was "uncontradicted" (D.&O., p. 11, n. 15). In effect, the Board had shifted the burden of proof to the Union to overcome Fibreboard's evidence, even though the Board itself questioned it. Fibreboard's evidence was "uncontradicted" by the Union precisely because Fibreboard had the burden of proof and had not met it. It had the best evidence available. It had complete control of all evidence relating to mitigation of damages. Because it had such evidence, which it failed to produce, it was impossible for the Union to contradict on the record the evidence that Fibreboard did produce. The fact that any weight at all is given to Fibreboard's evidence improperly shifts the burden of proof. There should be a more compelling reason than that the evidence is "uncontradicted" to cause this shift in the burden of proof.

In summary, the Board erred in crediting the "vague and uncertain" oral testimony, in overlooking Fibreboard's failure to produce books and records which admittedly were available, and in relying upon the Union's failure to contradict evidence which did not require or deserve contradiction.

The legal deficiency of the Board's approach is highlighted by the decided cases. The cases uniformly hold that an employer cannot meet the burden of proving job diminution by the oral testimony of its own agents. Trinity Valley Iron & Steel Co., 158 NLRB 890, 897 (employer's "oral declaration ... is inade-

quate"); Majestic Molded Products, Inc. v. NLRB, 330 F. 2d 603, 606 (2d Cir., 1964) (the defense is "not sustained by oral testimony alone"); NLRB v. Mooney Aircraft, 366 F.2d 809, 812 (5th Cir., 1966) ("bald assertions" are not enough). Rather, "to establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer;" NLRB v. Mastro Plastic Co., 354 F.2d 170, 176 (2d Cir., 1965) (emphasis added). See also Majestic Molded Products, supra. Here, those books and records were not introduced. What fragmented records were introduced were expressly declared by the Board to be of limited value.

Fibreboard failed to meet its burden of proof, and the Board's finding of the ten-job diminution is not supported by substantial evidence.

II. THE BOARD ERRED IN FINDING THAT THE COMPULSORY
RETIREMENT DATES OF SEVEN EMPLOYEES OCCURRED
PRIOR TO JANUARY 1, 1963.

In 1957, the Company and Union negotiated a provision that employees would be compulsorily retired at age 65. By the literal terms of that agreement, seven of the discharges would have been compulsorily retired on various dates in 1962. The Board applied that argument, and thus denied backpay to these seven discharges during the remainder of 1962 (D.&O., p. 16).

At the backpay hearing, however, the Union had introduced oral testimony and written documents to prove that the parties had agreed to an exception for those employees (including the seven discharges) who were between ages 60 and 65 on January 1, 1958. The exception was that this group of employees would be allowed to continue working until January 1, 1963, even though they reached age 65 before that date. Fibreboard introduced the oral testimony of one management representative who denied that the Company had agreed to such an exception.

In refusing to recognize the existence of such an exception, the Board stated that it was relying solely upon the Trial Examiner's resolution of the conflicting oral testimony. "[W]e rely on the fact that the Trial Examiner did not credit the Union witnesses who testified that an oral agreement postponing the compulsory retirement date of these men to January 1, 1963, was made." (D.&O., p. 16, n.23).

If all that existed was a testimonial conflict, resolved by the Board, the issue of course would not warrant this Court's attention. The fact is, however, that the Union introduced three documents prepared by the Company acknowledging the exception. The first of these (U. Exh. 16) was an exhibit prepared by Fibreboard and handed to the Union's representative during the 1965 negotiations (Tr. 672, 813, 842). With respect to each of the

seven discharges, the retirement date shown was January 1, 1963. It was prepared by Donald Blinco, Fibreboard's senior analyst in the corporate planning department (Tr. 815), from another document (Res. Exh. 28) which had been prepared by Blinco's predecessor, Charles Patzke (Tr. 817, 818), and which showed the same dates. Patzke is still employed by Fibreboard in Los Angeles (Tr. 817, 820) but was not called as a witness to rebut the document which he had drawn.

The third document (U. Exh. 17) is a letter from the Company's attorney to a Board representative, written for the very purpose of facilitating the computation of backpay in this proceeding. That letter, too, showed the retirement date for the seven discharges as January 1, 1963.

The Trial Examiner dismissed the effect of these three exhibits (U. Exh. 16, Res. Exh. 28 and U. Exh. 17) in two ways. First, he ruled that the parole evidence rule barred any extraneous proof to vary the terms of the written 1957 agreement. Second, he "believed" that the January 1, 1963, date in the three documents "was a coincidental error and not confirmation of the fact that the Company agreed that the retirement dates of these men were January 1, 1963." (TXD, p. 23).

The Board expressly rejected both of the Trial Ex-

aminer's rationales (D.&O., p. 16, n. 23):

"[W]e do not rely on the Trial Examiner's finding that the document submitted by the Respondent to the Board compliance officer in 1963 or the compilation ...submitted to the Union by the Respondent during the 1965 bargaining sessions, which shows the compulsory retirement dates of these men to be January 1, 1963, was a coincidental error and not confirmation of the fact that the Respondent agreed that the retirement dates of these men were January 1, 1963. Nor do we adopt his comments with respect to the parole evidence rule."^{9/}

Having rejected both of the Trial Examiner's bases for ignoring the documents, and having offered no bases of its own for ignoring them, the Board could be expected to honor the January 1, 1963, date. Surprisingly, it did not. Its entire reasoning for rejecting the 1963 date is contained in the following sentence, which immediately follows the quote above:

"Instead, we rely on the fact that the Trial Examiner did not credit the Union witnesses who testified that an oral agreement postponing the compulsory retirement date of these men to January 1, 1963, was made."
(D.&O., p. 16, n. 23).

This reasoning will not parse. Discrediting the Union witnesses' testimony does not result in discrediting the three documents penned by the Company representatives which stand for the same proposition. Those documents stand unimpeached. The Board has foresworn the Trial Examiner's efforts to dismiss them.

^{9/} The Board's rejection of the "coincidental error" theory plainly showed good sense. The probability of an "error" occurring which by "coincidence" showed each of the seven employees to have retired on precisely the date the Union claimed they did, is perhaps one in several billion.

The Board's conclusion flies in the face of its own reasoning. Since the Board refused to impeach the documents, it was bound to accept them for the admissions which plainly they are. Its contrary conclusion is arbitrary and capricious.

CONCLUSION

For the reasons set forth above, the remedies already provided in the Board's supplemental order should be enforced, but the case should be remanded with instructions that the Board provide the following additional remedies:

(1) Award reinstatement and backpay on the basis of the availability of ten additional jobs during the backpay period; and

(2) Recompute backpay for the seven disputed "compulsory retirees" on the basis of a January 1, 1963, retirement date.

Respectfully submitted,

Jay Darwin
Darwin & Riordan
68 Post Street
San Francisco, California 94104

Of Counsel:

Bernard Kleiman
10 South LaSalle Street
Chicago, Illinois 60603

Michael H. Gottesman
Bredhoff, Gottesman & Cohen
1001 Connecticut Avenue N. W.
Washington, D. C. 20036

Attorneys for United Steelworkers
of America, AFL-CIO

CERTIFICATE OF SERVICE

This is to certify that I have on this 28th day of July, 1970, sent by airmail, postage prepaid, two copies of the enclosed petition to the following:

Marcel Mallet-Prevost, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue N. W.
Washington, D. C. 20570

Donald Dennis Connors, Jr., Esq.
111 Sutter Street
San Francisco, California 94104


Michael H. Gottesman

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 23,853

FIBREBOARD CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Consolidated Petitions to Review and Cross-Applcation
to Enforce a Supplemental Decision and Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 3 1970

Nathan J. Paulson
CLERK

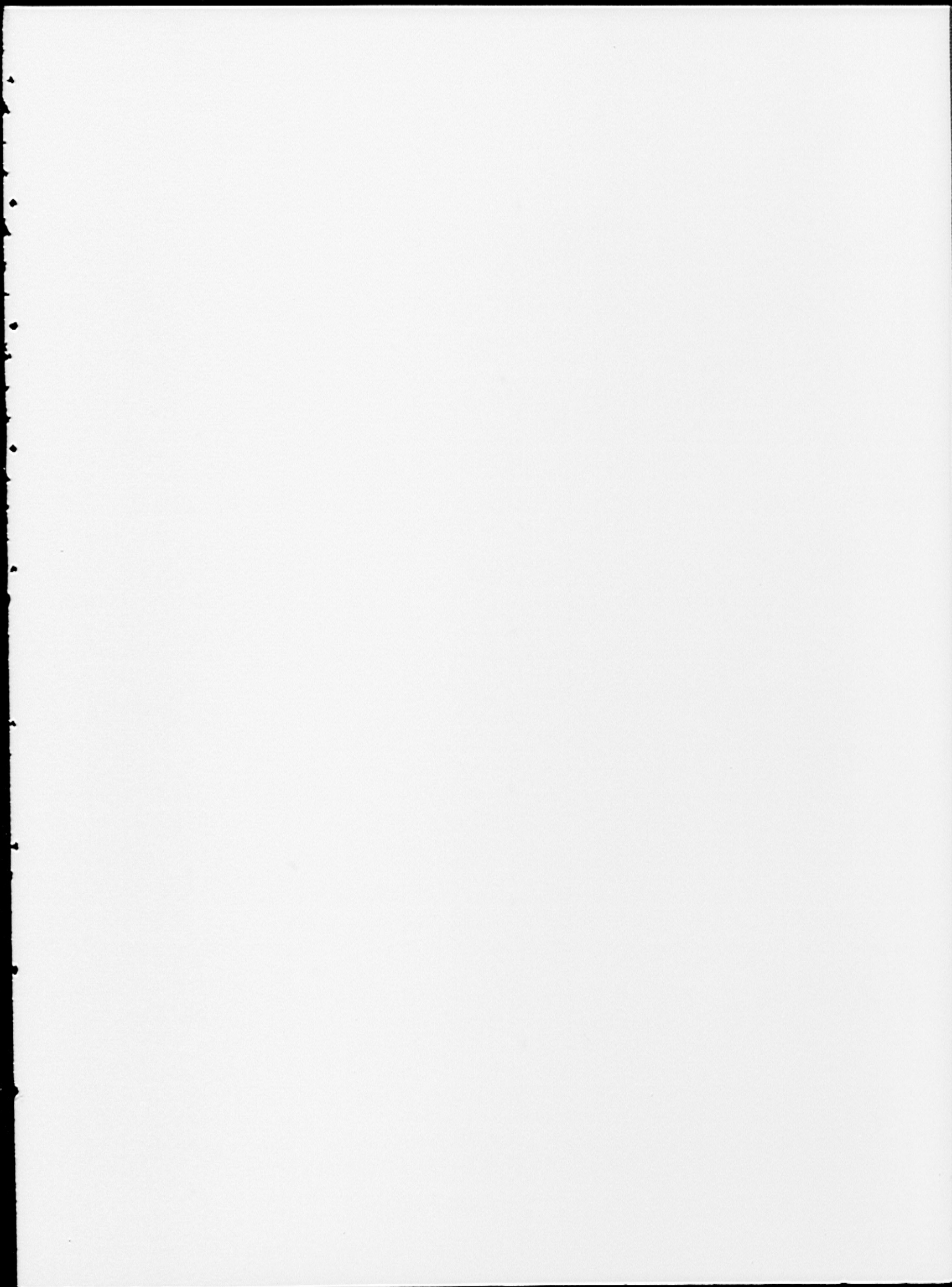
ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
JAMES P. HENDRICKS,
Attorneys,

National Labor Relations Board.



(i)

INDEX

	<u>Page</u>
COUNTERSTATEMENT OF ISSUES PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
I. References to rulings	2
II. The prior proceedings	3
III. The backpay proceedings	7
ARGUMENT	11
I. The Board properly determined the amounts of backpay due the unlawfully terminated employees	11
A. The controlling principles	11
B. The Board properly applied the wage formula contained in the collective bargaining agreement of the parties at the time of the unlawful termi- nation	13
C. The Board properly determined the number of unit jobs available during the backpay period	22
D. The Board properly directed the Company to pay interest on its backpay liability	25
E. The Board properly found that the Company failed to prove that wage claimant Fred C. Johnson wilfully incurred a loss of earnings	31
F. The Board properly rejected the Union's contention that the compulsory retirement dates for seven em- ployees had been extended	35
G. The Board properly determined that the Company's assertion that three employees should be denied rein- statement and backpay because of picket line miscon- duct was not timely raised	38

	<u>Page</u>
H. The Board properly determined that severance payments and early pension benefits received by employees during the hiatus period should not be deducted from gross backpay . . .	44
1. The severance payments . . .	44
2. The early pension benefits . . .	45
3. Current service benefits under the pension plan . . .	46
II. The Company was afforded a fair hearing during the supplemental backpay proceedings . . .	47
CONCLUSION . . .	49

AUTHORITIES CITED

Cases:

*Amalgamated Clothing Workers v. N.L.R.B., 112 U.S. App. D. C. 252, 302 F.2d 186 (1962) . . .	48
*American Compress Warehouse, 156 NLRB 267 (1965), enf'd, 374 F.2d 573 (C.A. 5, 1967) . . .	29, 30
Bituminous Material v. N.L.R.B., 281 F.2d 365 (C.A. 8, 1960) . . .	48
Carey Mfg. v. N.L.R.B., 331 F.2d 720 (C.A. 6, 1964), cert. denied, 379 U.S. 888 . . .	28
Cooke & Jones, 146 NLRB 1664 (1964), enf'd, 339 F.2d 580 (C.A. 1, 1964) . . .	21
Corning Glass Works v. N.L.R.B., 129 F.2d 967 (C.A. 2, 1942) . . .	30
Cuneo, John F., 152 NLRB 929 (1965), 159 NLRB 35 (1966), 160 NLRB 670 (1966) . . .	41

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
Ellis & Watts, 143 NLRB 1269 (1963)	28
*Fibreboard Paper Products v. N.L.R.B., 379 U.S. 203 (1964)	11
Gearhart & Otis, Inc. v. Securities & Exchange Commission, 121 U.S. App. D. C. 186, 348 F.2d 798 (1965)	39
*Glaziers' Local 558 v. N.L.R.B., 132 U.S. App. D. C. 394, 408 F.2d 197 (1969)	39
Haws Co., 161 NLRB 299 (1966), enf'd, 403 F.2d 979 (C.A. 6, 1968)	34
Hinson v. N.L.R.B., 74 LRRM 2194 (C.A. 8, 1970)	21
Int'l Bro. of Operative Potters v. N.L.R.B., 116 U.S. App. D. C. 35, 320 F.2d 757 (1963)	27, 30
I.U.E. v. N.L.R.B., 73 LRRM 2870 (C.A.D.C., 1970)	21, 27
*Isis Plumbing, 138 NLRB 716 (1962), enf'd, 322 F.2d 913 (C.A. 9, 1963)	27, 29
Joy Silk Mills v. N.L.R.B., 87 U.S. App. D. C. 360, 185 F.2d 732 (1950), cert. denied, 341 U.S. 914	38
Kohler v. N.L.R.B., 120 U.S. App. D. C. 259, 345 F.2d 748 (1965), cert. denied, 382 U.S. 836	40
Local 24, Teamsters v. Oliver, 358 U.S. 283 (1959)	4, 6
*Local 138, Operating Engineers, 151 NLRB 972 (1965), enf'd, 380 F.2d 244 (C.A. 9, 1967)	28, 31
Local 833, U.A.W. v. N.L.R.B., 112 U.S. App. D. C. 107, 300 F.2d 699 (1962), cert. denied, 370 U.S. 911	40

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
Lonzano Enterprises, 152 NLRB 258 (1965), enf'd, 356 F.2d 483 (C.A. 9, 1966)	29
Marshfield Steel v. N.L.R.B., 324 F.2d 333 (C.A. 8, 1963)	28, 30
*Mastro Plastics v. N.L.R.B., 350 U.S. 270 (1956)	11
*Mastro Plastics, 136 NLRB 1342 (1962), enf'd, 354 F.2d 170 (C.A. 2, 1965), cert. denied, 384 U.S. 972	12, 22
Nabors v. N.L.R.B., 323 F.2d 686 (C.A. 5, 1963), cert. denied, 376 U.S. 911	12, 32
*Nathanson v. N.L.R.B., 344 U.S. 25 (1952)	11
*N.L.R.B. v. Arduini Mfg., 394 F.2d 420 (C.A. 1, 1968)	31
*N.L.R.B. v. Biscayne TV, 337 F.2d 267 (C.A. 5, 1964)	17
N.L.R.B. v. Boswell, 136 F.2d 585 (C.A. 9, 1943)	12
N.L.R.B. v. Brashear Freight Lines, 127 F.2d 198 (C.A. 8, 1942)	30
*N.L.R.B. v. Brown & Root, 311 F.2d 447 (C.A. 8, 1963)	12, 13
N.L.R.B. v. Cambria Clay, 215 F.2d 48 (C.A. 6, 1954)	12
N.L.R.B. v. Cashman Auto, 223 F.2d 832 (C.A. 1, 1955)	32
*N.L.R.B. v. Cone Mills, 373 F.2d 495 (C.A. 4, 1967)	20
N.L.R.B. v. Deena Artware, 361 U.S. 398 (1960)	30

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
N.L.R.B. v. Difco Laboratories, 389 F.2d 663 (C.A. 6, 1968), cert. denied, 393 U.S. 828	43
N.L.R.B. v. Donnelly Garment, 330 U.S. 219 (1946)	43
N.L.R.B. v. Ellis & Watts, 344 F.2d 67 (C.A. 6, 1965)	12, 13
*N.L.R.B. v. Frontier Homes, 371 F.2d 974 (C.A. 8, 1967)	21
N.L.R.B. v. Globe Products, 322 F.2d 694 (C.A. 4, 1963)	28, 30
N.L.R.B. v. Great Dane Trailers, 363 F.2d 130 (C.A. 5, 1966), rev'd, 388 U.S. 26 (1967)	20
N.L.R.B. v. Interurban Gas, 354 F.2d 76 (C.A. 6, 1965)	12, 14
N.L.R.B. v. Kartarik, 227 F.2d 190 (C.A. 8, 1955)	14
N.L.R.B. v. Lambert, 211 F.2d 91 (C.A. 5, 1954)	41
N.L.R.B. v. Lewisburg Chair, 230 F.2d 155 (C.A. 5, 1956)	48
N.L.R.B. v. Light Boat Storage, 373 F.2d 762 (C.A. 5, 1967)	28
N.L.R.B. v. Louisiana Indus., 414 F.2d 227 (C.A. 5, 1969), cert. denied, 396 U.S. 1039	43
*N.L.R.B. v. Mar Salle, 73 LRRM 2517 (C.A.D.C., 1970)	43
*N.L.R.B. v. Mastro Plastics, 261 F.2d 147 (C.A. 2, 1958)	41, 43, 44
*N.L.R.B. v. Mastro Plastics, 354 F.2d 170 (C.A. 2, 1965), cert. denied, 384 U.S. 972	12, 32

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
N.L.R.B. v. Miami Coca-Cola, 360 F.2d 569 (C.A. 5, 1966)	12, 32
N.L.R.B. v. Mooney Aircraft, 366 F.2d 809 (C.A. 5, 1966)	12, 31
N.L.R.B. v. Mooney Aircraft, 375 F.2d 402 (C.A. 5, 1967), cert. denied, 389 U.S. 859	21
N.L.R.B. v. Ochoa Fertilizer, 368 U.S. 318 (1961)	43
N.L.R.B. v. Pittsburgh S.S., 337 U.S. 656 (1949)	48
N.L.R.B. v. Posner, 304 F.2d 773 (C.A. 2, 1962)	41
N.L.R.B. v. Pugh & Barr, 231 F.2d 558 (C.A. 4, 1956)	32, 34
*N.L.R.B. v. Remington Rand, 97 F.2d 195 (C.A. 2, 1938)	30
N.L.R.B. v. Rexall Chemical, 370 F.2d 363 (C.A. 1, 1967)	43
N.L.R.B. v. Reynolds, 399 F.2d 668 (C.A. 6, 1968)	31, 34
N.L.R.B. v. Rice Lake Creamery, 124 U.S. App. D. C. 355, 365 F.2d 888 (1966)	13, 17, 21
N.L.R.B. v. Robbins Tire, 161 F.2d 798 (C.A. 5, 1947)	48
*N.L.R.B. v. Rutter-Rex, 245 F.2d 594 (C.A. 5, 1957)	30
*N.L.R.B. v. Rutter-Rex, 396 U.S. 258 (1969)	11
N.L.R.B. v. Seven-Up Bottling, 344 U.S. 344 (1953)	11, 13, 45
N.L.R.B. v. Strong Roofing, 393 U.S. 357 (1969)	21

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
N.L.R.B. v. Thompson Transport, 406 F.2d 698 (C.A. 10, 1969)	43
N.L.R.B. v. Toppino & Sons, 358 F.2d 94 (C.A. 5, 1966)	12, 16, 17
N.L.R.B. v. Townsend, 185 F.2d 378 (C.A. 9, 1950), cert. denied, 341 U.S. 909	22
N.L.R.B. v. Transport Clearings, 311 F.2d 519 (C.A. 5, 1962)	48
N.L.R.B. v. WTVJ, 268 F.2d 346 (C.A. 5, 1959)	22
N.L.R.B. v. Walton Mfg., 369 U.S. 404 (1962)	38
N.L.R.B. v. White Superior Div., White Motor, 404 F.2d 1100 (C.A. 6, 1968)	17
Oil, Chemical & Atomic v. N.L.R.B., 124 U.S. App. D. C. 113, 362 F.2d 943 (1966)	21
Order of Railroad Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960)	4
Palmer v. Conn. Ry. & Lighting, 311 U.S. 544 (1941)	14
Phelps-Dodge v. N.L.R.B., 313 U.S. 177 (1941)	12, 13
*Porter, H. K. v. N.L.R.B., 397 U.S. 99 (1970)	19, 20
Reserve Supply v. N.L.R.B., 317 F.2d 785 (C.A. 2, 1963)	28
Revere Copper v. N.L.R.B., 324 F.2d 132 (C.A. 7, 1963)	28
Story Parchment v. Patterson, 282 U.S. 555 (1931)	14
Timken Roller Bearing, 70 NLRB 500 (1946), rev'd, 161 F.2d 949 (C.A. 6, 1947)	4, 6

* Authorities chiefly relied upon are marked by an asterisk.

	<u>Page</u>
Town & Country Mfg., 136 NLRB 1022 (1962), enf'd, 316 F.2d 846 (C.A. 5, 1963)	4
Tracy Towing, 166 NLRB 81 (1967), enf'd, 417 F.2d 865 (C.A. 2, 1969)	41
*U.S. v. Tucker Truck, 344 U.S. 33 (1952)	43
United Steelworkers v. Warrior & Gulf, 363 U.S. 574 (1960)	4
Virginia Electric & Power v. N.L.R.B., 319 U.S. 533 (1943)	12
Warehouse & Mail Order Empls. v. N.L.R.B., 112 U.S. App. D. C. 280, 302 F.2d 865 (1962)	22
*Woolworth, F. W., 90 NLRB 289 (1950)	45

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>)	2
Section 8(a)(1)	3
Section 8(a)(3)	3
Section 8(a)(5)	3, 4
Section 8(d)	4
Section 10(c)	2, 40, 42

Miscellaneous:

Jaffe, <i>The Judicial Enforcement of Administrative Orders</i> , 76 Harv. L. Rev. 865, 903-910 (1963)	30, 41
N.L.R.B. Rules and Regulations, Series 8 (29 C.F.R., Sec. 102.48(d)(1), 102.52	39

* Authorities chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,772

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 23,853

FIBREBOARD CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Consolidated Petitions to Review and Cross-Applcation
to Enforce a Supplemental Decision and Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Board properly determined the amounts of backpay due the unlawfully terminated employees.
2. Whether the employer was afforded a fair hearing during the supplemental backpay proceedings.

COUNTERSTATEMENT OF THE CASE

I. REFERENCES TO RULINGS

This case is now before the Court upon the petitions of the United Steelworkers of America, AFL-CIO (herein "the Union" or "Local 1304"), and Fibreboard Corporation (herein "the Company") to review and set aside in part, and upon the Board's cross-application to enforce, the Board's supplemental order issued against the Company on December 15, 1969, following backpay proceedings conducted pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) and Section 102.52, *et seq.*, of the Board's Rules and Regulations (29 C.F.R. 102.52, *et seq.*), as amended. The Board's supplemental decision and order are reported at 180 NLRB No. 33 (A. 57-100).¹

In accordance with Rule 8(d) of the Court's General Rules, the Board states that the underlying unfair labor practice proceedings have been before this Court previously. Thus, the Board's initial decision and order issued against the Company on March 27, 1961, and is reported at 130 NLRB 1558. Upon the Union's and General Counsel's petitions for reconsideration of that decision, the Board issued a supplemental decision and order on September 13, 1962, which is reported at 138 NLRB 550. This Court's decision enforcing in full the Board's order, as modified on reconsideration, issued on July 3, 1963, and is reported at 116 App. D. C. 198, 322 F.2d 411. The subsequent decision of the Supreme Court affirming this Court issued on December 14, 1964, and is reported at 379 U.S. 203.

¹ "A." references are to the printed Appendix. "G.C. Exh.," "Co. Exh." and "Un. Exh." references are to the General Counsel's exhibits, the Company's exhibits and the Union's exhibits, respectively; "Pl." references are to documents in "Vol. III, Pleadings." The above exhibit and pleading references are to documents not printed in the Appendix because they are not disputed by the parties.

The instant case concerns only the supplemental backpay proceedings, which have not been before this Court previously.

II. THE PRIOR PROCEEDINGS

Since 1937 the Union (Local 1304) has been the exclusive bargaining agent for a unit of maintenance employees at the Company's plant in Emeryville, California, which unit numbered about 50 persons in 1959. On May 26, 1959, the Union gave timely notice of its desire to modify the existing collective bargaining agreement, which would expire July 31, 1959. Thereafter, the Company undertook an intensive study of the possibility of contracting out its maintenance work. By July 27, the date of the first bargaining session, the Company had determined that a substantial saving could be effected by contracting the work to one of four firms. Accordingly, the Company apprised the Union at the July 27 meeting that it had reached "a definite decision" to let out the maintenance work effective August 1, 1959, and that "negotiation of a new contract would be pointless." The Union protested the Company's unilateral conduct, and the July 27 meeting ended in discord. (130 NLRB at 1559, 1562, 1567-1568.)

The parties met again on July 30. By this date, however, the Company had selected Fluor Maintenance, Inc. as the contractor for the plant's maintenance work. Consequently, the Company persisted in its refusal to bargain with the Union. The next day, July 31, 1959, the Company distributed termination notices to its maintenance employees, and the Union posted a picket line. Fluor, the contractor, started performing the maintenance work on the midnight shift that evening. (130 NLRB at 1559, 1562, 1568-1571.)

The Board, in its initial decision, dismissed the entire unfair labor practice complaint, including Section 8(a)(1), (3) and (5) allegations (130 NLRB

at 1562).² The Union and General Counsel thereafter petitioned the Board to reconsider its decision. On September 13, 1962, the Board issued a supplemental decision and order (138 NLRB 550). The Board (by a two-to-one vote) held that the Company had "violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the . . . [Union] over its decision to do so" (138 NLRB at 551-554).³ To remedy this unfair labor practice conduct, the Board ordered the Company, insofar as pertinent here, "to restore the *status quo ante* by reinstating its maintenance operation and fulfilling its statutory obligation to bargain." The Board, quoting from its earlier decision in *Town & Country Manufacturing Co., Inc.*, 136 NLRB 1022 (1962), enforced, 316 F.2d 846 (C.A. 5, 1963), determined that the employees' "loss of employment [here] stemmed directly from their employer's unlawful action in bypassing their bargaining agent" and, therefore, "a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action." The Company was directed to "offer reinstatement to the employees engaged in the maintenance operation to their

² Member Fanning dissented in part, stating (130 NLRB at 1564-1565):

In my opinion, Section 8(d) under existing Board and Supreme Court decisions imposes on an employer the duty to bargain about its decision to subcontract work performed by employees represented in a collective-bargaining unit [citations omitted].

³ The Board, in modifying its initial determination, made clear that resolution of this issue had been settled by earlier decisions of the Supreme Court and the Board, citing, *inter alia*, *Order of Railroad Telegraphers v. Chicago & Northwestern Railway Co.*, 362 U.S. 330, 335-336 (1960); *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 294-295 (1959); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Timken Roller Bearing Co.*, 70 NLRB 500, 518 (1946), reversed on other grounds, 161 F.2d 949 (C.A. 6, 1947). The Board, however, did not disturb its initial determination to dismiss those portions of the complaint alleging violations of Sections 8(a)(3) and (1) of the Act (138 NLRB at 551-554).

former or substantially equivalent positions without prejudice to their seniority or other rights and privileges," and to "make them whole for any loss of earnings suffered as a result of [the Company's] unlawful action in bypassing their bargaining agent and unilaterally subcontracting their jobs out of existence." The Board, however, in the exercise of its remedial discretion, declined "to hold [the Company] liable for backpay from the date [the employer] initially terminated" the unit employees because, as the Board stated, this would be inequitable since the Board had "reversed its own prior determination. . . ." Consequently, "[b]ackpay shall be based upon the earnings which [the employees] normally would receive from the date of this Supplemental Decision and Order to the date of [the Company's] offer of reinstatement. . . ." (138 NLRB at 554-557.)⁴

On review, this Court, in its decision entered on July 3, 1963 (116 App. D. C. 198, 322 F.2d 411), held "that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force." Further, this Court sustained in full the Board's remedial order (*ibid.*).

The Supreme Court granted certiorari and, in its decision issued on December 14, 1964 (379 U.S. 203), agreed that the "subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment' . . ." and, therefore, is a mandatory subject of

⁴ The backpay period, as discussed herein, began on September 14, 1962, and ended on January 18, 1965. The period during which backpay was tolled is referred to as the "hiatus period" (A. 58, n. 2).

collective bargaining under the Act.⁵ In addition, the Supreme Court upheld the Board's remedial determination. Thus, the Court stated (379 U.S. at 215-217):

[Section 10(c) of the Act] "charges the Board with the task of devising remedies to effectuate the policies of the Act." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. (*Ibid.*) "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540.

The Court concluded that "there has been no showing [here] that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company . . ." (*ibid.*).

⁵ The Supreme Court noted that the "situation here is not unlike that presented in *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283 (1959)." The Court added, "In reaching the conclusion that the subject matter in *Oliver* was a mandatory subject of collective bargaining, we cited with approval *Timken Roller Bearing Co.*, 70 NLRB 500, 518 (1946), enforcement denied on other grounds, 161 F.2d 949 (C.A. 6, 1947), where the Board in a situation factually similar to the present case held that Section 8(a)(5) and 9(a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit." (379 U.S. at 210-215.)

III. THE BACKPAY PROCEEDINGS

Following the unfair labor practice proceedings, the parties were unable to agree upon the amounts of backpay due the terminated unit employees (A. 4-5). Accordingly, on August 17, 1967, the Acting Regional Director for the Twentieth Region of the Board issued a backpay specification and notice of hearing (A. 582-593). Thereafter, on various dates between October 23 and December 15, 1967, hearings were held before the Trial Examiner on the issues raised by the backpay specification and the Company's answer, as amended during the course of the proceedings (A. 4-5; 139-144, G.C. Exhs. 1(k), (m), (n), (o), (p), (r), (q), Exh. B., pp. 5, 6, 16, 21, 31-33), TX. Exh. 1, and S.A. 1-38). On May 23, 1968, the Trial Examiner issued his backpay decision (A. 4-57). Thereafter, General Counsel, Local 1304 and the Company filed with the Board timely exceptions to the Examiner's decision (Pl., Vol. III, Pleading Nos. 10, 11, 12, 13). On December 15, 1969, the Board issued its supplemental decision and order (A. 57-100). On the basis of the evidence adduced at the backpay hearings, the Board made the following supplemental findings and conclusions:

Briefly, the Board found⁶ that the Company owed the sum of \$330,931.95 in backpay to 36 unlawfully terminated unit employees (A. 89-90).⁷ In

⁶ A more detailed discussion of the Board's supplemental findings and conclusions, insofar as pertinent to the issues now raised by the parties, appears in the argument portion of this brief.

⁷ The Company, in its brief to this Court (p. 1), acknowledges that "before the Board there was no dispute as to the fact that Fibreboard was liable for backpay in some amount; however, there was some disagreement over how the amount should be computed and what persons were entitled to share in the . . . award." As the Trial Examiner noted in his backpay decision (A. 4), General Counsel and the Union claimed that the backpay obligation was approximately \$378,000, whereas the Company argued that the amount should be some \$118,000.

computing this amount, the Board utilized the wage formula embodied in the collective bargaining agreement of the parties at the time of the termination (A. 58-66). Thus, as the Board found (A. 58-60), the wage rates of the unit machinists, up to their termination on July 31, 1959, were computed by using the so-called "Pabco Wage Formula", which was contained in the successive collective bargaining agreements of the parties from August 1, 1951 through July 31, 1959. Under that formula, the unit employees were paid a rate of "one dollar per day (or 12.5 cents per hour) less than the prevailing Building and Construction Crafts scale" (A. 58-59). The Board determined that the Pabco formula "provides the most reasonable, acceptable and objective approximation of what the backpay claimants would have received" (A. 65). Interest on the backpay obligation was to run from September 14, 1962, when the Board, as shown above, entered its order directing the Company to restore the *status quo ante* and "make [the employees] whole for any loss of earnings suffered as a result of" the employer's unlawful action (A. 72, 29-30).

The Board also found that there had been a diminution of available unit jobs following termination of the machinists on July 31, 1959. The Board concluded that the evidence adduced during the backpay hearings established that there were only 31 unit jobs available at the commencement of the backpay period, on September 14, 1962 (A. 66-69).⁸ Further, the Board — in resolving a dispute as to the compulsory retirement dates of seven of the unit employees under the operative retirement program — determined that four of the seven were ineligible for any backpay because

⁸ The Company contends in its brief (p. 45) that there were in fact only 29 unit jobs available. The Union argues (pp. 5-9) that, except as stipulated, the Company failed to meet its burden of establishing a diminution in unit jobs during the backpay period and, assertedly, there were 41.

their "compulsory retirement dates fell before the commencement of the backpay period . . ." (A. 72-73, 23-28).⁹

In addition, the Board rejected the Company's contention that one employee, Fred C. Johnson, was not entitled to backpay because he assertedly did not engage in a diligent and continuous effort to find employment following his termination. The Board found that Johnson, 58 years old at the time of his termination, had "made an honest, good faith effort to obtain work" throughout the relevant periods (A. 73-78). Further, the Board declined to pass upon the Company's contention that three employees — David Arca, Lincoln Beck and Carl Olson — had forfeited their rights to reinstatement and backpay because of their alleged picket line misconduct in August 1959, less than a month after they were terminated. In the Board's view, "the misconduct defense based on facts [of] which the [employer] had knowledge in August 1959, has been raised too late . . . as a ground for barring reinstatement and cannot be asserted as a bar in this backpay proceeding, the purpose of which is to determine the amounts of backpay due Arca, Beck, Olson and the other terminated machinists" (A. 78-84).

With respect to the Company's retirement plan, certain terminated machinists had elected to take early retirements on August 1, 1959. These employees received monthly retirement payments during the hiatus or tolled period (*supra*, n. 4) as well as the ensuing backpay period. The Board determined that the retirement benefits which were received during the latter period should be deducted from the employees' backpay; on the other hand,

⁹ The Union argues (pp. 19-22) that the retirement dates for all seven employees had been extended to January 1, 1963.

retirement benefits received during the hiatus period "should not be deducted from backpay" because "backpay did not accrue during the hiatus period" (A. 84-85). Likewise, the Board found that the terminated machinists were not entitled to certain "current service benefits" or "pension credits" during the tolled period "since such credits are based on wages received" and, as shown, the Board's order did not provide for backpay during this period (A. 70, 86).¹⁰ However, the Board determined that employees "are entitled to be treated as having been in service during the hiatus period. Thus, the hiatus period would not be considered a break in service and the rights of backpay claimants would be enhanced under the provisions of the [retirement] plan which makes length of service a factor to be considered," *i.e.*, an employee's "length of service prerequisite to participation in the plan"; his "guaranteed minimum retirement income"; the "amount of death benefit"; and the "vesting" of his rights in the plan (A. 30).

Finally, the Board refused to deduct from the employees' backpay the severance payments which the Company had made to them on July 31, 1959, because here, "unlike the normal case, backpay did not accrue from the date of termination," but was tolled until September 14, 1962 (A. 70-72).

¹⁰ Such benefits would include a financial credit to the employee's pension account, as discussed, *infra*, pp. 45-47.

ARGUMENT

I. THE BOARD PROPERLY DETERMINED THE AMOUNTS OF BACKPAY DUE THE UNLAWFULLY TERMINATED EMPLOYEES

A. The Controlling Principles

The Supreme Court recently set forth the Board's authority over the backpay remedy in *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, ~~262~~ 263 (1969), stating as follows:

* * *

We start with the broad command of Section 10(c) of the National Labor Relations Act, 29 U.S.C. Section 160(c), that upon finding that an unfair labor practice has been committed the Board shall order the violator "to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute, *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278 (1956), and the purpose of the remedy is clear. "A backpay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. N.L.R.B.*, 344 U.S. 25, 27 (1952). As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). "When the Board 'in the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order 'should stand unless it can be

shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.*, at 346-347.

The law is also clear that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed" (*N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (C.A. 2, 1965), cert. denied, 384 U.S. 972), and the General Counsel's burden is limited to showing "what would not have been taken from [the employees] if the Company had not contravened the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 544 (1943). This allocation of the burden is aptly expressed in *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8, 1963), as follows:

. . . in a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.

Accord: *N.L.R.B. v. J. G. Boswell Co.*, 136 F.2d 585, 597 (C.A. 9, 1943); *N.L.R.B. v. Interurban Gas Company*, 354 F.2d 76, 77 (C.A. 6, 1965); *N.L.R.B. v. Ellis & Watts Products, Inc.*, 344 F.2d 67, 69 (C.A. 6, 1965); *N.L.R.B. v. Cambria Clay Products*, 215 F.2d 48, 56 (C.A. 6, 1954); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (C.A. 5, 1966); *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809, 812 (C.A. 5, 1966); *Nabors v. N.L.R.B.*, 323 F.2d 686, 692 (C.A. 5, 1963), cert. denied, 376 U.S. 911. Cf. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-200 (1941).¹¹

¹¹ Although the General Counsel is required to present only the "gross amounts of back pay due", he goes further, pursuant to the Board's Rules and Regulations, Series 8 (29 C.F.R., Section 102.53), and includes in the backpay specification a deduction from gross backpay of all those amounts in mitigation which he discovered through, for example, personal interviews and social security records. The General Counsel performs

(Continued)

B. The Board Properly Applied The Wage Formula Contained In The Collective Bargaining Agreement Of The Parties At The Time Of The Unlawful Termination

The Board, under settled law, is vested with wide discretion in devising and selecting an appropriate backpay formula to make employees whole in the circumstances of a particular case. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198, 199 (1941). As the Eighth Circuit pointed out in *N.L.R.B. v. Brown & Root, Inc.*, *supra*, 311 F.2d at 452:

Obviously, in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations [W]ith respect to the formula for arriving at backpay rates or amounts which the Board may deem necessary to devise in a particular situation, [judicial] inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.

Accord: *N.L.R.B. v. Rice Lake Creamery Co.*, 124 App. D.C. 355, 357, 365 F.2d 888, 891 (1966); *N.L.R.B. v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 97 (C.A. 5, 1966); *N.L.R.B. v. Ellis and Watts*, *supra*, 344

(Footnote 11 Continued)

this service in the public interest, so as to provide full information to the employer and to limit the backpay demands, where he is aware of sums in mitigation. The General Counsel does not thereby assume "the burden of establishing the truth in all of the information supplied or of negating matters of defense or mitigation." *N.L.R.B. v. Brown & Root, Inc.*, *supra*, 311 F.2d at 454.

F.2d at 69; *N.L.R.B. v. Interurban Gas Co.*, *supra*, 354 F.2d at 77. "Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion." *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 651 (1941). Accord: *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 562 (1931); *N.L.R.B. v. Kartarik, Inc.*, 227 F.2d 190, 193 (C.A. 8, 1955).

In the instant case, the Board found that the "Pabco Wage Formula," embodied in the successive collective bargaining agreements of the parties from August 1, 1951 through July 31, 1959, "provides the most reasonable, acceptable and objective approximation of what the backpay claimants would have received" during the backpay period (A. 58-66, 6-14). Under that formula, the wage rates of the unit machinists were established "at one dollar per day [or 12.5 cents per hour] less than" the prevailing area scale for the "building and construction crafts" or "construction millwrights" (A. 58-59; 548-549, 634, 695).¹² The Company argues, (Br. pp. 10-25) that the "Board acted arbitrarily, punitively and in excess of its powers in rejecting" the substantially lesser wage rates paid by the employer to its few "ILWU millwrights" (*infra*, n. 14) as assertedly a more "accurate

¹² As the Board noted (A. 59, n. 3), the terms "building and construction crafts", "construction millwrights", and "building trades millwrights" are used interchangeably. They are, however, different from the few millwright employees of the Company who were represented by the International Longshoremen's and Warehousemen's Union (herein "ILWU millwrights"), and whose wage rates, as shown *infra*, "automatically" followed the rates of the unit machinists as computed under the Pabco formula.

The prevailing wage scales of the "building and construction crafts" or "construction millwrights" were as follows (A. 60, n. 6, 6, n. 9; 130): effective June 16, 1959 - \$3.76; June 16, 1960 - \$3.945; June 16, 1961 - \$4.18; June 16, 1962 - \$4.40; June 16, 1963 - \$4.63; June 16, 1965 - \$4.925. Under the Pabco formula, the machinists would have received 12.5 cents less per hour or, during the backpay period, as follows: September 14, 1962 to July 31, 1963 - \$4.275; August 1, 1963 to January 18, 1965 - \$4.505.

measure of what the reinstated [machinists] would have received during the backpay period . . .". We show hereinafter that the Board's determination plainly comports with the principles summarized above and fairly reflects earnings which the terminated unit employees would have realized absent the Company's unlawful conduct.

Thus, as the uncontroverted evidence of record shows, the collective bargaining agreements of the parties for the eight-year period preceding the unlawful termination of the unit machinists contained the Pabco wage formula. Following termination of the unit machinists on July 31, 1959, their work, with a minor exception,¹³ was given to an independent contractor. The contractor, in turn, employed millwrights and paid them throughout the ensuing backpay period the prevailing scale for the "building and construction crafts" or "construction millwrights" (A. 59-60, n. 6; 130, 569-570, 580-581). Accordingly, the millwright employees of the independent contractor, who were in fact performing 19 of 21 unit jobs found available during the backpay period (*infra*, pp. 22-25), were paid an hourly wage rate which was 12.5 cents more than the terminated machinists would have received under the Pabco formula (A. 60, n. 6).

The Company, as noted, *supra*, n. 12, also employed a few millwrights who were represented by the International International Longshoremen's and Warehousemen's Union. They performed about two of the 21 unit machinists' jobs available during the backpay period (*infra*, pp. 24-25). During the 13-year period preceding the termination of the unit machinists, these few "ILWU millwrights" received the same wage rates which were paid to Local 1304's unit machinists. However, the rates of the "ILWU

¹³ About 2 of 21 unit machinists' jobs found available during the backpay period were performed in part by the Company's "ILWU millwrights" (see, *infra*, pp. 24-25).

millwrights" were not independently negotiated, but instead "automatically" followed those provided for in Local 1304's contracts with the Company (A. 59; 129, 552). Following termination of the machinists, the "ILWU millwrights" received no wage increases until some time in 1961, when it was agreed that these few employees would receive the increases contained in the ILWU's contract covering the Company's "production workers" (A. 59; 552-562).¹⁴

Under these circumstances, the Board properly rejected the Company's contention that the wage rates paid to its few "ILWU millwrights" during the backpay period were the "best measure to determine gross backpay." Thus, although the Board agreed with the principle that ordinarily "[l]oss of earnings of backpay claimants should be measured by the earnings of their replacements or comparable employees,"¹⁵ it found from the uncontroverted evidence of record that "historically the ILWU millwrights' wage rates had followed the terminated machinists' rates in automatic fashion," and that, upon termination of the machinists in 1959, "the ILWU millwrights, of which these were apparently two, . . . neither bargained for nor received a wage increase until 1961" (A. 62). On the other hand, as the Board stated (*Ibid.*), "the independent contractor's employees who replaced 19 of the 21 jobs found available . . . in fact received higher rates

¹⁴ The Company's "production workers" performed work different from that performed by unit machinists and, under the ILWU's operative contracts, their wage rates were always substantially less than those paid to Local 1304's machinists (A. 59, 13 n. 28; 129, 133, 557-562). The rates which were paid to the two "ILWU millwrights" during the backpay period were as follows (A. 59 n. 5, 13 n. 28): September 1962 to May 31, 1963 - \$3.695; June 1, 1963 to May 31, 1964 - \$3.795; June 1, 1964 to May 31, 1965 - \$3.895. From June 1, 1965, these employees received \$3.985 per hour.

¹⁵ See, e.g., *N.L.R.B. v. Charley Toppino & Sons, Inc.*, *supra*, 358 F.2d at 97; and cases cited, *supra*, p. 12.

than the 'Pabco formula' would have provided." Accordingly, the Board reasonably concluded (A. 63):

* * *

In our opinion, if we accept the ILWU millwrights' rates as the backpay period wage rates, we are placed in the rather anomalous position of finding that the backpay claimants' rates should be determined by a control group (the ILWU millwrights) whose wage rate had previously followed their own, and who, for almost a 3-year period, might not have requested or received a wage increase precisely because of respondent's unlawful termination of the backpay claimants.

And, of course, "any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by [the Company], which bears the risk of that uncertainty" (A. 65). See, e.g., *N.L.R.B. v. Rice Lake Creamery Co.*, *supra*; *N.L.R.B. v. Charley Toppino & Sons, Inc.*, *supra*; and other cases cited, *supra*, p. 13.¹⁶

¹⁶ The Board noted that the Trial Examiner, in his backpay decision, failed to "consider . . . the wage rates of the independent contractor's employees who actually replaced the terminated machinists on 19 of the 21 jobs he found available during the backpay period" presumably because he erroneously "found that their hourly rate was \$4.00 in January 1965 or about the same rate as the ILWU millwrights" (A. 61-62, 11, n. 23). The hourly rate of the independent contractor's millwrights was in fact \$4.63 in January 1965 (*supra*, n. 12). Consequently, the rate of these replacements was more comparable to the January 1965 Pabco rate of \$4.505 than the "ILWU millwright" rate of \$3.895 (*supra*, n. 14). Moreover, that the Company may have in fact effected an overall saving by unlawfully contracting out unit work (because, for example, the contractor used fewer employees) does not detract from the comparability of the wage rate paid to the individual employees "who actually replaced the terminated machinists" (A. 60-61). In short, any asserted savings "proves only that [the employer] realized an economic dividend from" his unlawful conduct. See, e.g., *N.L.R.B. v. Biscayne Television Corp.*, 337 F.2d 267, 268 (C.A. 5, 1964); *N.L.R.B. v. Charley Toppino & Sons, Inc.*, *supra*, 358 F.2d at 96-97; *N.L.R.B. v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1104 (C.A. 6, 1968).

The Company next asserts (Br., pp. 12-13) that the "fairness of the ILWU rate as an indicia of what rate should be applied to the machinists . . . was substantiated by the fact that during this period the rates received by the millwrights were substantially higher than the highest rates . . . payable to maintenance machinists under any of the contracts Local 1304 had with other employers in the area." However, as the Board stated (A. 62, n. 10), "[t]he simple answer to [this] argument . . . is that prior to 1959, [the Company] had voluntarily negotiated contracts with the Union [Local 1304] which contained rates significantly higher than those paid by Foremost [Food and Chemicals] or other employers with whom the Union had contracts." Thus, for example, the Foremost contract rate was \$2.93 per hour in January 1958; the Fibreboard rate was \$3.375. In January 1959, the Foremost rate was \$3.04; the Fibreboard rate was \$3.525. (A. 62, n. 10; 481, 635, 737). Accordingly, the Board reasonably declined "to attach any significance to wage rates included in contracts negotiated by the Union with any other employer" (A. 62).

The Company cites (Br., pp. 12, 16-17) as further "evidence of the reasonableness in using the [ILWU] millwrights' rate as the measure of what the [Local 1304] machinists would have received . . . , the fact that when Fibreboard and Local 1304 did bargain in 1965 they agreed, in July of that year, to a rate of \$4.00 per hour." Thus, as the record shows (A. 63; 469-479), terminated unit machinists returned to work in March 1965 and agreed to work at \$3.74 per hour, "pending negotiations". In July 1965, the Company and the Union executed a collective bargaining agreement which provided for a \$4.00 hourly wage rate. The Board, although noting that this "subsequently negotiated wage rate is one factor to be considered in determining a wage rate applicable to the backpay period", refused to regard this rate as "the controlling factor" especially

when viewed in light of the Union's bargaining position in 1965 (A. 64). The Board found (A. 63-64; 471-472, 549-550):

* * *

The negotiations matched a Union weakened by 6 years off the job, without a majority of the former employees back in the plant, against a [Company] determined to preserve the savings it had achieved through its unlawful contracting-out . . . [Management] made it clear that it considered that its only obligation was to talk [Likewise,] the Union [representative] had been warned by its counsel to avoid an impasse at all cost.

Indeed, the Company's director of industrial relations, R.C. Thumann, admittedly apprised the Union at the outset of the first bargaining session (A. 549-550): "if we had only known back in '59 that we were supposed to do some talking before our minds were made up, why we would have gone through that motion . . . ; we are going through that motion now and as you understand fully . . . we are only obliged to discuss this matter with you and then, if we find that we cannot work it out to our satisfaction, we are at liberty to continue with our contracting." The Union's representative, Lloyd H. Ferber, fully understood his "weak position" at the bargaining table (A. 472). Under the circumstances, the Board reasonably concluded "that the wage rates that resulted from the 1965 bargaining should [not] be considered a controlling factor in the determination of the backpay wage rates" (A. 64).

Finally, the Company asserts (Br., pp. 10, 15, 17) that the Board — in utilizing the Pabco wage formula to compute the terminated machinists' backpay — has "impose[d] upon [the] parties a contract which the Board thinks they should have made", contrary to the Supreme Court's holding in *H.K. Porter Company, Inc. v. N.L.R.B.*, 397 U.S. 99, 73 LRRM 2561

(1970). This contention is plainly without merit. In *H. K. Porter, Inc.*, *supra*, the Supreme Court held that the Board could not remedy an employer's bad faith bargaining "by requiring the company to agree to check off the dues of the workers". Here, however, the Board has not compelled the "company or . . . union to agree to any substantive contractual provision of a collective bargaining agreement" (397 U.S. at 102). On the contrary, the Board, with Supreme Court approval (*supra*, pp. 5-6), has directed restoration of the *status quo ante* because the employees' "loss of employment stemmed directly from the employer's unlawful action in bypassing their bargaining agent" and, therefore, "a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action". In effecting this make-whole remedy, the Board has reasonably utilized the wage formula operative at the time of the employer's unlawful action.¹⁷

¹⁷ Before the Board, the Company — noting that the last of the series of contracts containing the Pabco wage formula expired on July 31, 1959 — asserted that if the "contract [had] continued in effect through the backpay period, [the employer] would be stuck with the [Pabco] wage formula" (A. 131-132). Thus, the Company argued, the wage rates contained in the contract also expired for purposes of computing backpay. This statement suggests a basic misconception of the role of the collective bargaining contract. The contract is material because, as shown above, it reflected the terms and conditions of employment with respect to wage rates on July 31, 1959, when it expired. Thereafter, the terms and conditions of employment embodied in that contract remained in effect until changed, and since the Union continued as collective bargaining representative after the expiration of the agreement, any change could lawfully have been effected only after notifying and consulting with the Union. As stated by the Fourth Circuit in *N.L.R.B. v. Cone Mills Corp.*, 373 F.2d 595, 598-599 (C.A. 4, 1967), "since the parties to a collective bargaining agreement normally contemplate a subsisting contractual relationship of indefinite duration with [as here] not infrequent renewals or renegotiations, and since the employment relationship generally continues beyond expiration or termination of the agreement . . . some rights [including wage rates] created by the collective bargaining agreement survive the termination of the agreement . . ." and may only be altered "after affording the union an opportunity to bargain". And see, *N.L.R.B. v. Great Dane Trailers, Inc.*, 363 F.2d 130, 133

(cont'd)

And, as the Supreme Court stated in this proceeding (*supra*, p. 6), "there has been no showing that the Board's order restoring the *status quo ante* to assure meaningful bargaining is not well designed to promote the policies of the Act". Cf. *N.L.R.B. v. Strong*, 393 U.S. 357 (1969); *N.L.R.B. v. Mooney Aircraft, Inc.*, 375 F.2d 402 (C.A. 5, 1967), cert. denied, 380 U.S. 859; *Int'l Union of Electrical, Radio & Machine Workers, etc. (Tiidee Products, Inc.) v. N.L.R.B.*, ____ App. D.C. ____, ____ F.2d ____, 73 LRRM 2870 (Nos. 22,797 and 22,911, decided April 3, 1970); and cases cited.

In sum, the Board, in applying its make-whole remedy, has reasonably approximated the backpay wage rate using the Pabco wage formula. As this Court stated in *N.L.R.B. v. Rice Lake Creamery Co.*, *supra*, 124 App. D.C. at 358, 365 F.2d at 841, this "formula may not reach the exactly correct figure, but there is no suggestion of a formula that could since the [claimants] did not work during the period. * * * The approximation thus reached is permissible in view of the impossibility of exactitude." And see cases cited, *supra*, pp. 13-14.¹⁸

(Footnote 17 continued)

(C.A. 5, 1966), reversed on other grounds, 388 U.S. 26, 30, 32 (1967); *Cooke & Jones, Inc.*, 146 NLRB 1664, 1675, 1677 (1964), enforced *per curiam*, 339 F.2d 580 (C.A. 1, 1964). Cf. *N.L.R.B. v. Frontier Homes Corp.*, 371 F.2d 974, 979-981 (C.A. 8, 1967); and cases cited. The Union, in the instant case, was afforded no "opportunity to bargain." And see, *Hinson v. N.L.R.B.*, 74 LRRM 2194 (C.A. 8, May 13, 1970).

¹⁸ The Trial Examiner concluded that the wage rates paid by the employer to its few "ILWU millwrights" should be utilized in computing backpay (A. 9-14). Although the Board reversed the Examiner (A. 58-66), the pertinent facts were essentially uncontradicted; no credibility resolutions were disturbed; and the disagreement related solely to the proper inferences to be drawn from the record and the interpretation of the law. In such cases, "the presumptively broader gauge and experience of members of the Board have a meaningful role". *Oil, Chemical & Atomic Workers Int'l Union, Local 42-43 v. N.L.R.B.*, 124 App. D.C. 113, 115-116, 362 F.2d 943, 945-946 (1966).

(cont'd)

C. The Board Properly Determined The Number Of Unit Jobs Available During The Backpay Period

It is settled that an employer, in a proceeding such as this, is "allowed the defense of job unavailability so that an otherwise appropriate backpay order will not work an undue economic hardship". *N.L.R.B. v. Mastro Plastics Corp.*, *supra*, 354 F.2d at 175-177; and cases cited. It is equally plain that it is the employer's "burden of alleging and proving that jobs were unavailable" for claimants "during the backpay period" (*Id.*, at 175).

In the instant case, the parties stipulated before the Board (A. 66-69, 14-15; 108-109, 121, 496-497, cf. Union's Brief, pp. 6-7, nn. 1-3, 12) that following the unlawful termination of 53 unit employees on July 31, 1959, the Company had effected for economic reasons substantial changes in its operations resulting in the diminution of unit jobs by the inception of the backpay period (*i.e.*, September 14, 1962 to January 18, 1965).¹⁹

(Footnote 18 continued)

The Company asserts (Br., p. 16, n. 11) that the General Counsel "filed no exceptions to the Trial Examiner's finding that the backpay rates should be those paid to the ILWU millwrights." On the contrary, the record makes plain that both the Union and General Counsel sufficiently excepted to this and related adverse findings (see, A. 58; 131, and S.A. 1-14, 18-36). In any event, "[e]ven absent an exception, the Board is not compelled to act as a rubber stamp for its Examiner. * * * The Board was free to use its own reasoning and was not bound by that of the Examiner". *N.L.R.B. v. WTVJ, Inc.*, 268 F.2d 346, 348 (C.A. 5, 1959); *N.L.R.B. v. Townsend*, 185 F.2d 378, 384 (C.A. 9, 1950), cert. den., 341 U.S. 909. In short, the Board is the final decision-making authority. See *Warehousemen and Mail Order Employees Local 743 v. N.L.R.B.*, 112 App. D.C. 280, 284, 302 F.2d 865, 869 (1962).

¹⁹ As stipulated, on October 1, 1960, the Company discontinued its floor covering or base felt plant in Emeryville (A. 108). On July 1, 1961, the Company closed its Emeryville linoleum plant (*Ibid.*). On December 1, 1961, the Company's central warehouse was demolished eliminating the "storekeeper's job" (A. 121). On March 1, 1962, the Company moved its roofing plant from Emeryville to its new facilities in Martinez (A. 108). On January 15, 1964 — ~~after commencement of the backpay period~~ — the Company installed automatic controls in its powerhouse, eliminating the jobs of five unit firemen (A. 109, 128). Thereafter, on October 21, 1964, the Company discontinued the powerhouse, terminating the five remaining unit engineers (A. 496-497).

pp 368-310 App
396-397

There was, however, a substantial dispute as to the exact number of unit jobs available in July 1959 and, consequently, the parties were unable to agree upon the actual number of unit jobs available at the commencement of the backpay period (A. 14-18).

The Board, in agreement with the Trial Examiner, found from essentially undisputed evidence (A. 66-69, 14-19) that, at the commencement of the backpay period, there were 10 unit jobs available at the Company's powerhouse facility; there were 14 unit machinists' jobs being performed by the maintenance contractor's millwright employees at the Company's Emeryville plant; there were five additional machinists' jobs being performed by the contractor's millwright employees at the Company's Martinez plant; and there were two unit jobs being performed by the Company's "ILWU millwrights" or "production workers" at the employer's felt mill and paint departments. The Company, in its brief to the Court (pp. 45-47), argues that there were in fact two less jobs available. We show hereinafter that the Board's determination is amply supported by the evidence of record.

There is no dispute that, at the commencement of the backpay period, there were available for terminated employees 10 powerhouse jobs which, as shown above, were thereafter eliminated when the Company's powerhouse operation was phased out (A. 66, nn. 13, 14). In addition, William P. Reinsenberg, a plant engineer at the Company's facility in Emeryville, testified without contradiction that unit maintenance personnel were "regularly assigned to the [Emeryville] insulation" department and that during the subsequent backpay period five millwrights employed by the maintenance contractor continued to be "regularly assigned" to the facility as the "standard crew" (A. 67; 278-285).²⁰ Likewise, William

²⁰ Reinsenberg testified, *inter alia*, that the unit machinists, before the Company contracted out its maintenance work, had worked "a two-shift five-day" operation and that

Maffey, the plant engineer in charge of the Company's main shop at Emeryville during the backpay period, testified that – "in addition" to the five millwrights assigned to the insulation department – "six to nine" millwrights employed by the contractor were "usually" assigned to perform unit work at the main shop in Emeryville (A. 67-68; 286-288, 295-298, 571-572). The Board, "[r]esolving the uncertainty against the" Company, who, as shown above, had the burden of establishing the diminution, found that "the independent contractor utilized 9 millwrights in addition to the 5 millwrights assigned to [the] insulation [department], or a total of 14 millwrights at Emeryville" (A. 67-68).²¹ Further, John Sandrin, the plant engineer at the Company's roofing plant in Martinez, testified that five of the independent contractor's millwrights were regularly assigned unit work in his department during the backpay period (A. 68; 333-336). Thus, the independent contractor's millwrights performed 19 unit jobs during the backpay period.

Finally, Emeryville Plant Manager Maffey testified that the Company's few "ILWU millwrights" replaced terminated machinists in the Company's felt mill; these millwrights "took over practically all the work that had

(Footnote 20 continued)

"additional help", when needed, was dispatched from the Company's main shop at Emeryville (A. 281). This situation remained substantially unchanged during the subsequent backpay period (A. 284-285).

²¹ The Trial Examiner, in finding that 14 maintenance jobs were available at Emeryville, relied upon "a record of man hours worked by the independent contractor's millwrights during 13 of the 28 months comprising the backpay period. By utilizing the average number of hours worked by a machinist in 1958, the [Company] demonstrated that approximately 13½ jobs . . . were available at the main shop in Emeryville" (A. 66-68; 731, 680). The Board, noting that these exhibits cover only a portion of the backpay period and are limited to Emeryville, "utilized this evidence only for the limited purpose" of checking "the accuracy of the testimony of [the Company's] witnesses" (A. 66-67, nn. 15, 18).

been done by Local 1304 in the felt mill" or the equivalent of "half" jobs (A. 67-69; 304). Maffey also testified that the Company "production workers" (*supra*, n. 14) did the work formerly performed by unit machinists in the employer's paint shop requiring "less than one man's time" (A. 67-69; 293, 301-303). Accordingly, as the Board reasonably found, there were two unit jobs available in the paint shop and felt mill combined. The total number of jobs thus available for terminated machinists, including 10 powerhouse jobs existing at the inception of the backpay period, was 31 (A. 68-70).²²

D. The Board Properly Directed The Company To Pay Interest On Its Backpay Liability

The Board, in its order entered on September 13, 1962 (*supra*, pp. 7-10), directed the Company to offer reinstatement to the terminated unit machinists and "make them whole for any loss of earnings suffered as a result of [the employer's] unlawful action" (138 NLRB at 554-555).

²² The Union states (pp. 5-7) that there "were jobs for fifty-three employees" on July 31, 1959; that it "was stipulated that twelve of the fifty-three jobs were eliminated prior to the commencement of the backpay period as a result of changes in the Company's operations"; and that the Company failed to sufficiently establish that there were fewer than 41 remaining jobs available at the commencement of the backpay period. This argument, as the Board noted (A. 66-67, n. 14), is premised upon the disputed assertion that there were in fact 53 unit jobs available on July 31, 1959 (See, A. 14-17; 125-127, 291-292, 309-310, 337-338, 345-348, 572-578, 600-602, 739). The Board, noting this "dispute", determined on the basis of the uncontradicted and substantiated testimony summarized above that the Company had sufficiently demonstrated that there were only 31 unit jobs available at the outset of the backpay period (A. 66, n. 14, 11, n. 15).

As for the Company's contention (p. 45) that there were two fewer jobs at Emeryville, the Board reasonably concluded that the employer had not sufficiently established this fact and, of course, this was the Company's burden of proof (A. 69, n. 17; 295-298, 571-572).

The Board, however, determined that the Company's backpay obligation was to run prospectively only, "from the date of this [order] to the date of the [Company's] offer of reinstatement" (*Ibid.*). The Company thereafter made no attempt to comply with this make-whole directive until January 18, 1965, when — following the Supreme Court's affirmance of this Court's decision enforcing the Board's order in full — the Company offered reinstatement to a substantial number of unit employees and thereby terminated the accrual of its backpay liability to them (A. 583, G.C. Exh. 1(k), pages 1-2). Subsequently, as shown herein, the Company disputed the amount of its total backpay obligation.

The Board's order of September 13, 1962, made no provision for interest on the employer's backpay liability. However, General Counsel, upon instituting these supplemental proceedings, requested in his backpay specification that the employees also be awarded interest on their respective wage claims (A. 29; 586). The Trial Examiner, in his supplemental decision (A. 30), found that the Board, since entry of its initial order in this case, has "allowed interest on earnings lost as a result of" an employer's unlawful conduct "even when the original order", as here, contained no provision for interest. He then determined that interest should also accrue in this case at six percent per annum on a quarterly basis from the end of each quarter for which backpay was owed, since September 14, 1962 (*Ibid.*). The Board, in its supplemental decision, sustained the Examiner (A. 72).

The Company now argues (Br., pp. 16-25) that "the Board acted capriciously, unlawfully and with a punitive intent in altering its original backpay order" to provide for interest. We show hereinafter that the Board, in granting interest on the Company's total backpay obligation, acted well within its remedial discretion and in accordance with Board policies approved by this and other Courts of Appeals.

Thus, in the Board's decision in *Isis Plumbing & Heating Co.*, 138 NLRB 716, 719-721 (1962), enforcement denied on other grounds, 322 F.2d 913 (C.A. 9, 1963), which issued less than a week after its decision in the instant case, the Board (former Members Rodgers and Leedom dissenting), stated:

* * *

"Backpay" granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent's wrong. It is not a fine or penalty imposed on the respondent by the Board. "It is an indebtedness arising out of an obligation imposed by statute . . .".

* * *

Accordingly, under accepted legal and equitable principles, interest should be added to backpay awards made to employees who have been discriminatorily separated from their employment. [citations omitted.]²³

In *International Brotherhood of Operative Potters v. N.L.R.B.*, 116 App. D.C. 35, 39, 320 F.2d 757, 761 (1963), this Court sustained the Board's authority to award interest on backpay claims, stating as follows:

²³ The Board, noting that its "practice until the present time has not been to require the payment of interest on backpay awards", concluded that (138 NLRB at 720):

. . . in adding interest to backpay awards, the Board is bringing its practice into conformity with the general principles of law, is achieving a more equitable result, and is encouraging compliance with Board orders. On the other hand, in terms of the amounts actually involved, the additional burden imposed on the wrongdoer by requiring the payment of interest is, in all but the unusual case, a relatively minimal burden. [citations omitted.]

* * *

* * *

In the evolution of the law of remedies some things are bound to happen for the "first time". As a supplement to existing remedies long approved we cannot say that the allowance of interest is other than a factor which effectuates the policies of the Act, for it is plainly in the direction of making the employee whole. [citations omitted.]

* * *

Accord: *N.L.R.B. v. George E. Light Boat Storage, Inc.*, 373 F.2d 762, 766 (C.A. 5, 1967); *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729-731 (C.A. 6, 1964), cert. denied, 379 U.S. 888; *Marshfield Steel Co. v. N.L.R.B.*, 324 F.2d 333, 337-339 (C.A. 8, 1963); *Revere Copper & Brass, Inc. v. N.L.R.B.*, 324 F.2d 132, 137 (C.A. 7, 1963); *N.L.R.B. v. Globe Products Corp.*, 322 F.2d 694, 696-697 (C.A. 4, 1963); *Reserve Supply Corp. of L.I., Inc. v. N.L.R.B.*, 317 F.2d 785, 789-790 (C.A. 2, 1963); and cases cited.

Subsequently, in *Local 138, International Union of Operating Engineers*, 151 NLRB 972 (1965), enforced in pertinent part, 380 F.2d 244, 254 (C.A. 2, 1967), the Board considered whether interest should also be assessed on an outstanding backpay debt where, as in the instant case, the Board's initial order made no provision for interest. The Board, reversing earlier precedent (see, e.g., *Ellis and Watts Products Co.*, 143 NLRB 1269, 1272 (1963)), held as follows (151 NLRB at 974):

* * *

To require interest on the liquidated backpay obligation does not enlarge upon the original Board order specifying the method of the backpay computation, nor is it inconsistent with the terms of the Board's original order or of the enforcing decree. The same equitable

and policy considerations which impelled us in *Isis Plumbing & Heating Co.* . . . to revise our usual backpay order to allow interest on earnings lost as a result of discrimination now lead us to conclude that it is similarly fitting and proper, even where the original order is silent thereon, to provide for interest on the total net backpay obligation once the amount of that obligation has been adjudicated.

* * *

The Board, however, directed that "interest accrue only from the date of" its supplemental order because the Trial Examiner's "disallowance of such interest followed earlier Board precedent which we are now overruling . . ." (*ibid.*). Accord: *Lozano Enterprises*, 152 NLRB 258, 260, n. 8, 265 n. 40 (1965), enforced, 356 F.2d 483 (C.A. 9, 1966).

Thereafter, in *American Compress Warehouse*, 156 NLRB 267, 276, n. 35 (1965), enforced, 374 F.2d 573 (C.A. 5, 1967), the Board, as here, sustained the Trial Examiner's determination in supplemental proceedings to award interest "from the end of each calendar quarter" for which backpay was owed, although the Board's initial order as enforced contained no interest provision. The Fifth Circuit, in affirming the Board's supplemental order, held as follows (374 F.2d at 575-576):

* * *

The [employer's] position misconstrues the authority and duty of the Board to revise and supplement its remedial orders where necessary to effectuate the purposes of the Act. The supplemental orders may not "enlarge upon" or be "inconsistent with" the terms of the court's enforcement decree. The interest award does neither, for it simply conforms to the Board's original order that the employer make the discharged employees whole for any loss of pay suffered by reason of the discrimination against them. [Footnotes omitted.]

See *N.L.R.B. v. Brashear Freight Lines, Inc.*, 127 F.2d 198, 200 (C.A. 8, 1942); *Corning Glass Works v. N.L.R.B.*, 129 F.2d 967, 973 (C.A. 2, 1942); See also, *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 410-412 (1960) (Justice Frankfurter concurring); Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865, 903-910 (1963).

The foregoing authorities make it plain that the Board, in supplemental proceedings, has the remedial discretion to assess interest against an employer for his entire net backpay obligation even though, as here, the Board's initial order as enforced contained no interest provision. The Board, in requiring the payment of interest on an outstanding backpay liability, is reasonably implementing its original make-whole directive. For, inasmuch as the employer "had the use of the money it wrongfully withheld", to make the employee-claimants whole requires "payment of interest for the time the backpay was wrongfully withheld." *Marshfield Steel Co. v. N.L.R.B.*, *supra*, 324 F.2d at 338; *N.L.R.B. v. Globe Products Corp.*, *supra*, 322 F.2d at 697. In sum, "the allowance of interest . . . is a factor which effectuates the policies of the Act for it is plainly in the direction of making the employees whole" *International Brotherhood of Operative Potters v. N.L.R.B.*, *supra*, 116 App. D.C. at 39, 320 F.2d at 761.

The Company asserts (Br., p. 24) that here the Board has unreasonably altered the employer's initial liability because interest will allegedly add some \$88,000 to its outstanding wage indebtedness. Of course, as shown above, the Board's order of September 13, 1962, was prospective and the Company could have avoided this financial burden by promptly offering reinstatement to the employees. "[H]aving chosen to challenge the law, it must abide the loss." Cf. *N.L.R.B. v. Remington Rand, Inc.*, 97 F.2d 195, 197 (C.A. 2, 1938); *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 245 F.2d 594, 598 (C.A. 5, 1957). Further, the Company asserts (Br.,

pp. 20-21) that the Board, in computing interest on the entire backpay obligation, has unreasonably reversed its policy announced in *Local 138, Int'l Union of Operating Engineers, supra*, 151 NLRB at 574, of running "interest only from the date of the supplemental decision." We submit that the Board's exercise of its remedial discretion to compute interest prospectively in *Operating Engineers* and other early cases, because it had there reversed its own precedent, did not thereafter preclude it from fully applying the rationale stated in *Operating Engineers*, as was done in *American Compress, supra*, and here. Indeed, in this case, the Board had granted the Company a substantial hiatus in its backpay obligation, from July 31, 1959 until September 13, 1962. The Board's make-whole order, as shown, was prospective. Under the circumstances, to now require payment of interest on the entire backpay debt is certainly not an abuse of remedial discretion. See cases cited, *supra*, pp. 27-30.

E. The Board Properly Found That The Company Failed To Prove That Wage Claimant Fred C. Johnson Wilfully Incurred A Loss Of Earnings

The Company argues (Br., pp. 38-44) that employee Fred C. Johnson is not entitled to backpay because he assertedly did not engage in a diligent and continuous effort to find gainful employment following his termination and thereby incurred a wilful loss of earnings. "The cases are unanimous", however, that the defense of wilful loss of earnings is an "affirmative defense" and the burden is on the employer to prove the defense. *N.L.R.B. v. Mooney Aircraft, Inc., supra*, 366 F.2d at 813; *N.L.R.B. v. Reynolds*, 399 F.2d 668 (C.A. 6, 1968). Moreover, while the employer may show that the employee failed to make "reasonable efforts to mitigate [his] loss of income * * * [the employee is] held * * * only to reasonable exertions in this regard, not the highest standard of diligence." *N.L.R.B. v. Arduini Mfg. Co.,*

394 F.2d 420, 422, 423 (C.A. 1, 1968). Accord: *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (C.A. 5, 1966); *Nabors Co. v. N.L.R.B.*, 323 F.2d 686, 693 (C.A. 5, 1963); cert. denied, 376 F.2d 911. "Success" is not the measure of the sufficiency of the employee's search for interim employment; the law "only requires an honest good faith effort." *N.L.R.B. v. Cashman Auto Co.*, 223 F.2d 832, 836 (C.A. 1, 1955). And, of course, in determining the reasonableness of that effort, factors such as the employee's age and prevailing labor conditions must be considered. See, e.g., *N.L.R.B. v. Pugh & Barr, Inc.*, 231 F.2d 558, 559 (C.A. 4, 1956); *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962), enforced, 354 F.2d 170 (C.A. 2, 1965), cert. denied, 384 U.S. 972.

In this case, the only evidence adduced by the Company in support of its contention was the uncontradicted testimony of employee Johnson, which may be summarized as follows (A. 73; 145-173):

Johnson had been employed by the Company for approximately 23 years prior to his termination on July 31, 1959 (A. 73-78; 172). He was then 58 years old (A. 160). Immediately following his termination, Johnson sought other employment. Thus, he "registered" with both the Union and the State Employment Service and reported to them weekly, but without success (A. 73; 158). In addition, Johnson "went to every place in the Bay Area [he] figured [he] could get a job [which he] could handle" (A. 73-74; 159).²⁴ He "would look at the telephone book in the morning," "make a check [of] the industrial plants

²⁴ Among the companies at which he specifically recalled applying were American Machine and Foundry; American Can Company; Continental Can Company; Mother's Cake and Cookies; a press punch company; and a trailer company (A. 74 n. 29; 159-163).

and that day [he] would go see two or three of them, and the next day . . . do the same thing" (A. 73-74; 159). He also answered "help wanted" ads, but he met with little success because, as stated, he was 58 years old at the time and, although classified as a machinist by the Company, was not a journeyman (A. 74; 159-160, 163). Indeed, at least one personnel manager "couldn't hang up the receiver fast enough" when Johnson, in answer to a question, revealed his age (A. 74, n. 30; 160).

In November 1959, Johnson secured work as a machinist with a trailer company but was laid off in February 1960. He subsequently resumed his search for employment, maintaining his registration with both the Union and the State Employment Service (A. 74; 157-159). In May 1960, having found work for only three of the previous nine months, he sold his house in Oakland and moved to South Lake Tahoe, California, where he had purchased a lot three years earlier (A. 74; 145-147, 164-166). After moving to South Lake Tahoe, which had no industrial plant, he worked in a motel and in a boat repair shop (A. 74; 147, 154-156, 166-167). In addition, Johnson and a younger friend had ventured into the contracting business, but with no success (A. 74; 164-167).

From 1960 to March of 1965, Johnson made frequent trips back to the Bay Area checking with the Union about the availability of work, but again without success (A. 74; 167-170). He was reinstated by the Company on March 18, 1965 (reinstatement was originally scheduled for January 1965), but terminated his employment and returned to South Lake Tahoe on April 2, 1965 (A. 74; 153-155). As shown, Johnson had worked seven of the eleven quarters during his backpay period (A. 74, 77).

On this uncontradicted testimony, the Board, in disagreement with the Trial Examiner, reasonably concluded that the Company had not sustained its burden of establishing that Johnson wilfully incurred a loss of

earnings during the backpay period (A. 73-78, 40-47). On the contrary, as the Board found (A. 76), "Johnson made satisfactory and reasonable efforts to obtain work through his registration at the Union hall, the State Employment Office, and his own independent actions."²⁵ Moreover, Johnson was under no obligation to continue such a presumptively futile search indefinitely, and his move to a rural area was not, as shown above, a withdrawal from the labor market. See, e.g., *N.L.R.B. v. Pugh & Barr, Inc.*, *supra*; *N.L.R.B. v. Reynolds Box Co.*, *supra*; *Robert Haws Company*, 161 NLRB 299, 304 (1966), enforced in pertinent part, 403 F.2d 979 (C.A. 6, 1968).

In sum, the Board properly determined that Johnson had "made an honest, good faith effort to obtain work throughout the hiatus and backpay periods" (A. 78).²⁶

²⁵ The Board noted that the Trial Examiner improperly drew "adverse inferences and presumptions concerning Johnson's motivation" because, *inter alia*, he testified that he eventually intended to retire to Lake Tahoe. However, Johnson did not retire; he moved there only after making unsuccessful attempts to find work in the Bay Area and he continued in those efforts (A. 75; 145-147, 164, 166). Likewise, that Johnson was at the time receiving a \$4,000 per annum investment income is immaterial since he was also receiving this investment income when employed by the Company (A. 75-76; 147-152). He was not eligible for Social Security and retirement benefits until seven years after he moved to Lake Tahoe (A. 172). Finally, that Johnson quit a few weeks after reinstatement is of no consequence here. He testified that when offered reinstatement in January 1965, he thought that he would get at least two or three months' work (A. 153-154). However, he was not recalled until March and left in early April to keep "another engagement" which he had previously made (*Ibid.*).

²⁶ The Board reversed only the "inferences" and "presumptions" which the Trial Examiner made on the basis of Johnson's uncontradicted testimony (A. 74-76). This, of course, it may properly do. See, *supra*, p. 21, n. 18.

F. The Board Properly Rejected The Union's Contention That The Compulsory Retirement Dates For Seven Employees Had Been Extended

The Company's Retirement Plan, which had been accepted by the Union in 1957, provided for compulsory retirement at the age of 65 (A. 72, 23-28; 405-406, 503-505, 642-643, 644-645).²⁷ It was stipulated before the Board that employment terminates at the compulsory retirement date and thus ends all backpay eligibility (A. 116-118).

In dispute are the compulsory retirement dates for seven unit employees as computed under this Plan.²⁸ The Union acknowledges in its

²⁷ Section 17 of the Plan stated in pertinent part as follows (*Ibid.*):

* * *

(b) For participants who have attained age sixty (60) but have not yet attained age sixty-five (65) at September 1, 1945, the normal retirement date shall be the first day of any calendar month elected by participant following the attainment of age sixty-five (65), but not later than the first day of the calendar month next following the attainment of the fifth birthday subsequent to September 1, 1945.

* * *

(e) For a member eligible to participate in the Plan under Section 6(d) the normal retirement date shall be determined under the foregoing subsections of this Section 17, substituting for "September 1, 1945" his unit eligibility date provided for in Section 6(d).

The unit eligibility date for the backpay claimants involved, as set forth in Section 6(d), was January 1, 1958 (*Ibid.*).

²⁸ The seven employees and their respective retirement dates, as found by the Board, are (A. 72, 28): Gronberg - February 1, 1962; Capps - June 1, 1962; J.P. Johnson - August 1, 1962; Holmes - September 1, 1962; Crispino - October 1, 1962; Hamidy - December 1, 1962; and Bennett - December 1, 1962. As a consequence of this computation, employees Gronberg, Capps, Johnson and Holmes are totally ineligible for backpay since their retirement dates fell before commencement of the backpay period (A. 73, n. 24).

brief (p. 19) that "[b]y the literal terms of" the Retirement Plan the seven employees "would have been compulsorily retired on various dates in 1962". However, the Union asserts that the parties had, in effect, orally agreed in 1957, when the Union adopted the Plan, to extend the compulsory retirement dates for the employees until January 1, 1963. We show below that the Board and the Trial Examiner reasonably rejected this contention.

In support of this claim, David Arca, the Union's recording secretary, and Lloyd Ferber, its business representative, testified that during the negotiating sessions between the parties in 1957, it was orally agreed that "those members [of the unit] who were over 60 years of age would have five years from January 1958 before they would be compelled to retire" (A. 24-26; 393-395, 405-428, 448-449, 459-462). Under the Retirement Plan, as assertedly modified, the seven claimants whose retirement dates are now disputed would have had until January 1, 1963 in which to retire (*Ibid.*).²⁹ On the other hand, R.C. Thumann, the Company's director of industrial relations who was present during all of the 1957 meetings with the Union, unequivocally testified that he did not "at any time tell any of the unions that a man who on January 1st, '58 was between the ages of 60 and 65 would have five years after January '58 before he would be required to retire" (A. 26; 538-540). Company personnel manager Robert

²⁹ In an attempt to corroborate this assertion, the Union showed that during contract negotiations in 1965 — some eight years after the alleged modifications of the Plan — the Company representatives furnished the Union representatives with a list stating the retirement dates for all unit employees. That list showed, *inter alia*, the retirement dates for the seven disputed claimants as of January 1, 1963 (A. 25, 27; 463-469, 516-534, 696-697). Further, on March 24, 1965, the Company's counsel, in an effort to obtain an agreed computation of backpay in this case, wrote the Board's regional compliance officer a letter containing a similar list (A. 27; 423, 698-703). The Company claimed that use of the 1963 dates was a mistake (A. 516-534).

Baldwin also attended these meetings (A. 25-26; 502-504). At no time did he or any other Company official tell the Union "that men who were between 60 and 65 on January 1st, 1958 would be entitled to work five years after that date" (A. 72, 25-26; 505-506).

On this showing, the Trial Examiner, as affirmed by the Board, discredited the testimony of the Union's witnesses that an oral modification of the Plan had been agreed upon in 1957 (A. 26-28).³⁰ The Board

³⁰ The Trial Examiner noted that "[c]orroborative of this finding" is a letter addressed to the Company, dated June 21, 1957 and bearing the signatures of Union officials Ferber and Arca, which stated (A. 27; 681):

* * *

The Fibreboard pension plan has been accepted by the Machinists in principle. However, there is one point we would like to ask to be clarified and also ask for consideration on, that is the fact that the machinist group were off work for some 14 weeks through no fault of their own during the year 1949 due to labor difficulties with another union. We are requesting that an adjustment be considered for the above-stated period. We believe such adjustment could be made in accordance with Section 2, paragraph 1, page 23, of the Fibreboard pension plan.

* * *

The Examiner found it "incongruous" that so minor a matter was put in writing and, yet, the alleged waiving of a five-year eligibility period was never reduced to writing. Further confirmation, the Examiner found, was a letter from Ferber to the Company dated December 4, 1957, ratifying another oral agreement regarding the pension plan. Clearly, the Examiner reasoned, the Union was cognizant of the propriety of reducing such oral agreements to written form (A. 26-28; 694).

The Examiner referred to the Company's letter of March 24, 1965 and related schedule (*supra*, n. 29), listing the retirement dates of the seven claimants as January 1, 1963, as "coincidental error" and not "confirmation of the fact that the Company had agreed" upon these dates (A. 27). Further, the Examiner noted that, *arguendo*, the parol evidence rule would preclude establishing such an oral modification of the Plan (A. 27-28). The Board, in affirming the Examiner's credibility resolutions, did not rely upon his characterization of the March 1965 letter or his understanding of the parol evidence rule (A. 72, n. 23).

reasonably adopted his credibility resolutions (A. 72) and, we respectfully submit that no special reason has been shown why this determination should now be overturned. See, e.g., *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1961); *Joy Silk Mills, Inc. v. N.L.R.B.*, 87 App. D.C. 360, 369, 185 F.2d 732, 742 (1950), cert. denied, 341 U.S. 914.

G. The Board Properly Determined That The Company's Assertion That Three Employees Should Be Denied Reinstatement And Backpay Because Of Picket Line Misconduct Was Not Timely Raised

At the backpay hearings, the Company asserted for the first time that it should not be required to reinstate and make whole three employees (Lincoln Beck, David Arca and Carl Olson), as directed in the Board's initial order, because these employees assertedly had engaged in misconduct while picketing the employer's plant during August 1959 (A. 78-84, 30-40). General Counsel objected to receipt of any evidence pertaining to this defense because it was not timely raised during the earlier unfair labor practice proceeding (A. 78, n. 37; 174-176, 341-344). The Trial Examiner overruled the objection and found that Arca and Beck had forfeited their right to reinstatement and backpay as a result of their misconduct (A. 30-40). He also found that the asserted misconduct of Olson did not warrant denying him reinstatement and backpay (*Ibid.*). The Board (former Member Zagoria dissenting) reversed the Examiner except as to Olson, stating as follows (A. 78-79, 83-84):

* * *

[T]he misconduct defense based on facts of which the [Company] had knowledge in August 1959, has been raised too late to be now considered . . . as a ground for barring reinstatement, and cannot be

asserted as a bar in this backpay proceeding, the purpose of which is to determine the amounts of backpay due Arca, Beck, Olson and the other terminated machinists.

The Company now argues (Br., pp. 25-38) that the foregoing determination "has no basis in the Act", is inconsistent "with the prior procedural practices of the Board", and is "patently unjust". We show hereinafter that these and related contentions made by the Company are plainly without merit.

Thus, as the Board found, the alleged picket line misconduct of the three employees occurred in August 1959, over a month prior to the initial unfair labor practice hearing, conducted on September 21 and 22, 1959 (A. 78, 30; 183). The Company was fully aware of this alleged activity prior to the unfair labor practice hearing, for it had previously litigated this same matter in a contempt trial before the Superior Court of Alameda County, California, from August 24 to September 11, 1959 (A. 79; 661, 668). Moreover, although the Superior Court had issued its findings of fact and conclusions of law on October 7, 1959 (the decision and judgment were not rendered until December 2, 1959), which was before the parties had filed briefs with the Trial Examiner in the unfair labor practice case, the Company did not raise this misconduct defense in its brief to the Examiner, request that the Superior Court's contempt findings be made a part of the record below, or thereafter request that the record be reopened to receive evidence on this matter (A. 79, n. 39).³¹ Indeed, the only explanation which the Company now

³¹ See Section 102.48(d)(1) of the Board's Rules and Regulations, Series 8 (29 C.F.R. Sec. 102.48(d)(1)), which provides for motions for reconsideration, rehearing and reopening of the record before the Board. And see, *Glazier's Local No. 558 v. N.L.R.B.*, 132 App. D.C. 394, 399, 400, 408 F.2d 197, 202-203 (1969); *Gearhart & Otis, Inc. v. Securities & Exchange Commission*, 121 App. D.C. 186, 189, 348 F.2d 798, 801 (1965).

offers for its total failure to raise this defense in a timely manner during the unfair labor practice proceeding (Br., p. 29) is that "the Company had little reason to anticipate that it would be found to have violated the Act and even less to expect that . . . it would be required to resume the work it had contracted out". However, as shown, *supra*, pp. 4-6, this Court and the Supreme Court, in unanimous decisions, made clear that resolution of the issues raised in this case had been settled by earlier decisions of the Board and the Supreme Court.

The Company argues that the "question of misconduct . . . raises an issue which is wholly collateral to those raised by the unfair labor practice charge itself, and to consider it at the unfair labor practice hearing would . . . unnecessarily protract the hearing . . ." (Br., pp. 35-36). Thus, as the Board noted in its supplemental decision (A. 80), the Company "would . . . equate the diminution of jobs, wage rates, and failure to exercise due diligence in seeking other work during the backpay period with the issue of disqualification for misconduct or 'cause' under Section 10(c) of the Act."³² The Board rejected this contention, "for the former issues are properly matters of compliance in that they go to the issues of the amount of [a respondent's] liability or damages, whereas the latter issue goes to the remedy itself" — *i.e.*, "the right of reinstatement" (*Ibid.*). Thus, as the Board explained (A. 80, n. 40):

³² Section 10(c) provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." See, *e.g.*, *Local 833, UAW v. N.L.R.B.*, 112 App. D.C. 107, 110-113, 300 F.2d 699, 702-705 (1962), cert. den., 370 U.S. 911; *Kohler Co. v. N.L.R.B.*, 120 App. D.C. 259, 345 F.2d 748 (1965), cert. denied, 382 U.S. 836.

* * *

[I]f the defense of diminution of jobs is raised, the right of reinstatement and backpay of the employee involved is not in question, rather the issue is whether the respondent is able to comply On the other hand, when an employee is denied reinstatement and backpay for "cause" (misconduct) he has no right to reinstatement or backpay whether his former position is available or not.

* * *

In sum, "the issue of disqualification for misconduct . . . can be determined with finality in the original proceeding (providing the facts were then known) and is not dependent on the establishment of the backpay period or the changing nature of respondent's business" (*Ibid.*).

The foregoing statement of Board policy is not, as the Company claims (Br., p. 27), a "new rule of procedure." See, e.g., *N.L.R.B. v. Mastro Plastics Corp.*, 261 F.2d 147, 148-149 (C.A. 2, 1958); *N.L.R.B. v. Lambert*, 211 F.2d 91, 94 (C.A. 5, 1954); *John F. Cuneo Co.*, 152 NLRB 929, 932-933 (1965), 159 NLRB 35 (1966), 160 NLRB 670 n. 1 (1966); *Tracy Towing Line, Inc.*, 166 NLRB 81 (1967), enforced 417 F.2d 865 (C.A. 2, 1969); cf. *N.L.R.B. v. I. Posner, Inc.*, 304 F.2d 773, 774 (C.A. 2, 1962) (where the court did not permit the Board to follow its practice because "the examiner [in the initial proceeding] had misled respondent into reserving such a defense . . ."). And see, Jaffe, *The Judicial Enforcement Of Administrative Orders*, *supra*, 76 Harv. L.Rev. at 903-914 (and authorities cited).

Thus, for example, in *N.L.R.B. v. Mastro Plastics Corp.*, *supra*, civil contempt proceedings were instituted against an employer for failing to reinstate one of 77 employees as directed by the Board in its initial order,

which order was sustained by the Court of Appeals and the Supreme Court. The Company asserted that it had "sufficient grounds to justify not reinstating" the employee. The Second Circuit, in rejecting this defense, stated in pertinent part as follows (261 F.2d at 148-149):

* * *

In March of 1952 hearings were held before a trial examiner on a complaint charging Mastro with unfair labor practices in discharging 77 employees, including Yolanda Flamio. Although the discharge and reinstatement of these employees were the central issues in dispute, Mastro never asserted the improper conduct conviction as a ground for not reinstating her. No valid reason has been offered by respondents to excuse their failure to raise the conviction issue before the trial examiner. Their failure to assert the conviction before the Board would itself have precluded them from asserting it here in 1954, 29 U.S.C. Section 160(e), and necessarily prevents such assertion now.³³

The Second Circuit held that the employer had failed to seek timely modification of the Board's reinstatement order. "Furthermore," the Court stated (261 F.2d at 149), "[m]odification should not be considered unless it is based upon subsequent events or subsequently discovered evidence which would tend to show that reinstatement would no longer further the purpose of the Act" (citations omitted). And, of course, once such an order is enforced, the "only proper recourse was to petition [the] court for modification of its clear mandate" (*Ibid.*). In the instant case, as in

³³ Section 10(e), 29 U.S.C. 160(e), provides: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Mastro Plastics, the Company failed to seek timely modification of the reinstatement remedy from either the Board or this Court, and it has "shown nothing which can excuse [it] from complying with [the] prior order" (*Ibid.*).³⁴

It is clear that the Board may, as here, require a litigant to assert a particular defense in an initial proceeding or thereafter be barred from relitigating the matter before the Board in subsequent proceedings or before a court of appeals. See, e.g., *N.L.R.B. v. Rexall Chemical Co.*, 370 F.2d 363 (C.A. 1, 1967); *N.L.R.B. v. Thompson Transport Co.*, 406 F.2d 698, 701-702 (C.A. 10, 1969); *N.L.R.B. v. Difco Laboratories*, 389 F.2d 663, 668 (C.A. 6, 1968), cert. denied, 393 U.S. 828; *N.L.R.B. v. Louisiana Industries, Inc.*, 414 F.2d 227 (C.A. 5, 1969), cert. denied, 396 U.S. 1039. And see, *N.L.R.B. v. Mar Salle, Inc.*, App. D.C. , F.2d , 73 LRRM 2517 (No. 22,621, 1970). For, as the Supreme Court stated in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952), "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts not topple over administration decisions unless the administrative body not only has erred, but has erred against objection made at a time appropriate under its practice." And see, *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 228

³⁴ As noted *supra*, n. 31, the Board's rules make ample provision for rehearing and modification of its orders. Significantly, the Company on July 11, 1962, filed a petition with the Board to reopen the record in the unfair labor practice case for the purpose of introducing testimony relating to the reduction of its maintenance work force (A. 79). The Company, however, did not also seek to reopen the record with reference to the misconduct defense. The Board, under its practice as restated above, determined that the issue of unit job diminution should "properly be treated at the compliance stage of the proceedings" (*Ibid.*).

(1946); *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961); and cases cited, *supra*, n. 31.³⁵

Under the circumstances, the Board reasonably declined to permit litigation of the employees' alleged misconduct during the supplemental backpay proceedings.

H. The Board Properly Determined That Severance Payments And Early Pension Benefits Received By Employees During The Hiatus Period Should Not Be Deducted From Gross Backpay

1. The severance payments

The Company argues (Br., pp. 47-49) that the Board erred in failing to deduct severance payments made to employees from their gross backpay awards. We submit that the Board's determination was in accordance with settled policy.

Thus, as the record shows (A. 70; 109-110, 114, G.C. Exh. 1(r), sch. 5), severance payments were made to the employees along with two weeks

³⁵ The Company argues that the Board has heretofore barred a misconduct defense in a backpay proceeding only where an employee's misconduct is an "integral part of the very issue which is determined at the unfair labor practice proceeding" (Br., pp. 27-35). This contention is plainly contrary to the holding in *Mastro Plastics Corp.* (and see cases cited *supra*, p. 41), which involved the mass discharge of striking employees. Moreover, the cases cited by the Company (Br., pp. 28-34) do not support its contention and, in any event, the Company has not demonstrated that the Board, in following its practice here, acted unreasonably or arbitrarily.

The Company also cites cases (Br., pp. 30-32) where the Board allegedly reviewed employee misconduct in supplemental proceedings. However, as the Board noted in its supplemental decision (A. 82, n. 44), the question whether such a defense was timely asserted was not raised or considered in those cases.

pay in lieu of notice. The severance payments, which were based on the employees' past service, varied from about \$280 to \$775. The collective bargaining agreement between the parties had made no provision for such payments. Moreover, as the Board found (A. 71), "there was no bilateral contractual relationship established by which the employees voluntarily terminated employment in return for severance payments".

The Board, in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), stated that an employee's interim earnings in one backpay quarter would not be deducted from accrued backpay in another quarter. The Supreme Court sustained this determination in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Under this policy, the Board "has allowed severance payments as a deduction from gross backpay when backpay has accrued in the quarter in which the payment was made" (A. 71). However, in the instant case, backpay "did not accrue from the date of termination" until September 14, 1962, and under *Woolworth* the Board reasonably declined to deduct the severance payments from accrued backpay in a later period. The Board, in thus following its *Woolworth* formula, did not act unreasonably or arbitrarily.

2. The early pension benefits

Certain terminated machinists³⁶ elected to take early retirement or pension benefits on August 1, 1959. It is uncontested that these employees would not have elected to take early retirement benefits except for their unlawful termination (A. 85; Co. Br., p. 48). These employees

³⁶ Bennett, Capps, Crispino, Fuller, Gronberg, Hamidy, Hughes, E.T. Johnson, J.P. Johnson, Lowell, Nash and Smith (A. 28, n. 48, 88, n. 51; 110, G.C. Exh. 1(r) sch. 5).

received monthly retirement benefits during the hiatus period as well as during the backpay period. The Board determined that (A. 85):

Since backpay did not accrue during the hiatus period, under the Board's quarterly method of determining backpay owing . . . early retirement benefits received in that period should not be deducted from backpay which accrued after the hiatus period.

This determination is fully consistent with the Board's ruling on severance payments and, in addition, has not been shown to be unreasonable.

3. Current service benefits under the Pension Plan

The Board, in agreement with the Examiner, determined that the terminated machinists were not entitled to "current service benefits" or "pension credits" during the tolled period "since such credits are based on wages received" and, of course, the order did not provide for backpay during this period (A. 69-70, 86).³⁷ Further, the Board, in agreement

³⁷ These benefits would include periodic credits to the employee's pension account which are translated into income after retirement (A. 20-22). Thus, as the Board explained (A. 86; 313-324, 326-329, 640-644, G.C. Exh. 1(r) Exh. B. p. 21):

The employees' contributions (by payroll deductions) to the Plan are determined by the amount of their earnings. In addition, the [employer] contributes those amounts which are actuarially determined to be necessary so that when added to the employees' contributions, they will assure an adequate fund from which to pay retirement and death benefits called for in the Plan. Upon retirement an employee receives a monthly income drawn from the past and current service benefits (provided by the employer's and employees' contributions) which have accrued to his account. A member of the Plan whose employment is terminated and who has completed 20 years of service and attained age 55 can elect to continue as a participant in the

(cont'd)

with the Examiner (A. 86; 136-138), determined that the terminated employees – although not entitled to pension credits during the tolled period (*supra*, n. 4) – are entitled to be treated as having been in service for that period. The Board concluded (A. 86):

[T]he hiatus period would not be considered a break in service and the rights of the backpay claimants would be enhanced under the provisions of the Plan which make length of service a factor to be considered. Among these are length of service prerequisite to participation in the Plan (Section 6(b)); guaranteed minimum retirement income (Section 13(a)); amount of death benefit (Section 14); and vesting (Section 15).

The Company does not show that the foregoing rulings were arbitrary or unreasonable.

II. THE COMPANY WAS AFFORDED A FAIR HEARING DURING THE SUPPLEMENTAL BACKPAY PROCEEDINGS

A pervasive theme of the Company's brief is that the Board's determinations made during the backpay proceedings (summarized *supra*, pp. 7-10) were the product of bias. Thus, for example, the Company asserts that the "ends to which the Board has gone to accomplish [its] reversal [of certain rulings made by the Examiner] and to maximize backpay liability in other respects, bespeaks an ill-disguised animosity toward the

(Footnote 37 continued)

Plan and receive a retirement income either immediately or after age 65. Alternatively, a terminated employee who does not meet the foregoing requisites receives a refund, with interest, of his deposits.

Company and a frame of mind more bent towards imposing the maximum penalty . . . than towards rendering the employees whole for their losses . . .” (Br., p. 10). Elsewhere, the Company accuses the Board of acting with “a punitive intent” because it assessed interest on the employer’s overdue backpay debt (p. 19).

We respectfully submit that the Board’s various determinations, as discussed above, are both reasonable and proper. Moreover, “[t]he controversy [here] involved strong feelings. It is not uncommon for litigants to feel that adverse rulings demonstrate bias particularly where, as was not the case here, they are unanimously adverse. But even the unanimity of rulings is not necessarily indicative of bias.” *Bituminous Material & Supply Co. v. N.L.R.B.*, 281 F.2d 365, 372 (C.A. 8, 1969). And see, *N.L.R.B. v. Pittsburgh S. S. Co.*, 337 U.S. 656, 659-660 (1949); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 112 App. D.C. 252, 255-256, 302 F.2d 186, 190 (1962); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 161 F.2d 798, 800 (C.A. 5, 1947). In such circumstances, “the one against whom the decision has gone” frequently charges that the trier of fact, “be he baseball umpire, trial judge or hearing examiner, is biased.” *N.L.R.B. v. Lewisburg Chair & Furniture Co.*, 230 F.2d 155, 156 (C.A. 3, 1956); *N.L.R.B. v. Transport Clearings, Inc.*, 311 F.2d 519, 521-523 (C.A. 5, 1962). This record, however, does not support such an assertion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition of the Union (No. 23,772) and the petition of the Company (No. 23,853) be denied, and that judgment should be entered enforcing the Board's supplemental order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FRANK H. ITKIN,
JAMES P. HENDRICKS,
Attorneys,

National Labor Relations Board.

May 1970.